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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 In Re: September 11 Litigation

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21 MC 101  
08 CV 3719 (AKH)  
08 CV 3722 (AKH)

4 -----x  
5 New York, N.Y.  
6 July 18, 2013  
7 10:10 a.m.

8 Before:

9 HON. ALVIN K. HELLERSTEIN

10 District Judge

11 APPEARANCES

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and 7 World Trade Co.

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1 APPEARANCES (Cont'd)

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Attorneys for Defendant Boeing Co.

3 BY: BRIAN S. FRASER, ESQ.

4 Also Present: Jonathan w. Knipe

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1 (In open court; case called)

2 THE COURT: Mr. Podesta, please. Closing for the  
3 defense. It's now 10:05.

4 MR. PODESTA: May it please the Court: Roger Podesta  
5 for the aviation defendants.

6 In Monday's opening, I identified the three questions  
7 that the Court would have to decide in order to resolve the  
8 correspondence issues presented by this trial: First, for what  
9 type of claim the plaintiffs potentially may obtain tort  
10 damages, and in what amounts; second, for what type of loss did  
11 the plaintiffs receive insurance payments, and in what amounts;  
12 and, third, do the insurance recoveries and potential tort  
13 damage awards compensate or reimburse plaintiffs for the same  
14 category of loss, and how complete is the offset?

15 Now that the evidence is in, the aviation defendants  
16 urge the Court to find that WTCP's insurance payments for the  
17 complex, of \$4.091 billion, correspond to, and entirely offset,  
18 its maximum potential tort damages recovery of \$2.805 billion,  
19 and that 7 WTC Co.'s insurance recoveries of 831 million  
20 correspond to, and fully offset, its maximum potential tort  
21 damages award of 739 million except for its fine arts claim of  
22 approximately \$300,000.

23 Now, as to the first question, the nature and amounts  
24 of plaintiffs' maximum potential tort damages awards -- there's  
25 essentially no dispute -- the Court should find as follows:

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1 First, that WTCP's maximum potential tort damage award for  
2 damages to its net leasehold interest in the complex is  
3 \$2.805 billion; second, that 7 WTC Co.'s maximum potential tort  
4 damage award for damages to its net leasehold interest in WT 7  
5 is \$737 million; and, finally, that 7 WTC Co.'s maximum  
6 potential tort damage award for its separate lost personal  
7 property claim is \$1,846,000.

8 As the Court has repeatedly held, the tort damage  
9 awards for the leasehold are determined under the "lesser of  
10 two" rule, whereby a property damage plaintiff is entitled to  
11 recovery of replacement cost of its property or the reduction  
12 of its fair market value, whichever dollar amount is lower.

13 In their briefs, plaintiffs maintain that the Court  
14 has barred them from any recovery of replacement cost  
15 whatsoever, on legal grounds. And Professor Shavell's  
16 testimony, as per counsel's instruction, was based on that same  
17 assumption.

18 Plaintiffs' position appears to be based on a  
19 misinterpretation of the Court's ruling that WTCP may not  
20 recover tort damages based on its contractual obligation to  
21 rebuild the complex because the aviation defendants' conduct  
22 was not the proximate cause of the contractual covenant to  
23 rebuild. But this is a misunderstanding. The Court's ruling  
24 simply barred plaintiffs from recovering replacement cost  
25 damages in excess of the amount of fair market value on the

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1 basis of their contractual obligation to rebuild. The aviation  
2 defendants have never moved to dismiss plaintiffs' replacement  
3 cost claims altogether, and plaintiffs remain free to seek  
4 replacement costs under the "lesser of two" rule in their  
5 capacities as long-term necessary leaseholders with the right  
6 to occupy and rent the building for 99 years and with the  
7 consent of the Port Authority by suing in its stead, as they  
8 have, for replacement costs as in place of fee simple owner.

9 THE COURT: The \$2.805 billion price valued also the  
10 obligations?

11 MR. PODESTA: I believe it necessarily valued all the  
12 obligations in the leases, yes. That would --

13 THE COURT: So, probably the value, without the  
14 obligation of the property, was greater than 2.805 billion but  
15 the plaintiffs did not avail themselves of the opportunity to  
16 prove the higher value when I gave them the opportunity and,  
17 therefore, it's not reflected in our calculations here.

18 MR. PODESTA: That is correct, your Honor.

19 In both its December 2008 partial summary judgment  
20 ruling that rejected plaintiffs' contractual obligation theory  
21 for recovery, and in all four of its --

22 THE COURT: Could the person in the back sit down,  
23 please.

24 MR. PODESTA: -- and in all four of its major damages  
25 correspondence rulings since, the Court has repeatedly stated

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1 it's applying the "lesser of two" rule to the plaintiffs'  
2 claims. In its most recent, December 2012, ruling relating to  
3 WTC 7, the Court stated replacement costs would provide the  
4 measure of damages for the leasehold interest in WTC 7 if they  
5 were proven to be less than reduction of fair market value.

6 And it's important to note the "lesser of two" rule  
7 does not prevent a property damage plaintiff from recovering  
8 either replacement cost or reduction in fair market value.  
9 They can seek both. The rule simply limits the dollar amount  
10 of the recovery to the lesser dollar amount proven. This Court  
11 has applied the "lesser of two" rule in the same way that the  
12 Court of Appeals applied it in Fisher.

13 THE COURT: Actually, they come together, Mr. Podesta,  
14 and the expert testimony has helped me refine my view. The  
15 replacement cost is limited by replacement of the value that  
16 the property had as of the date of the catastrophe; and,  
17 therefore, you can collect that much replacement value, as  
18 reflecting that amount. In insurance, however, whatever the  
19 replacement is, to the extent it's proveable and satisfies the  
20 insurance company, that's the recovery; so, an insurance could  
21 be more, but in a tort recovery, replacement cost cannot exceed  
22 it.

23 MR. PODESTA: That's correct, except there is a  
24 supplement for temporary loss rental income during the building  
25 period, as we discussed, but that's essentially correct. And I

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1 believe that was the situation in Fisher as well.

2 As to the second question, the nature and amounts of  
3 plaintiffs' insurance recoveries --

4 THE COURT: There are certain additional consequential  
5 costs. It's not required, in an ordinary tort recovery, to  
6 plug in the costs of rebuilding. A person who's lost an asset  
7 can take his money and walk away.

8 MR. PODESTA: That's absolutely correct.

9 THE COURT: In an insurance setting, if you have  
10 business interruption, you can collect the lost income and  
11 usually in this kind of a setting it's tied together with a  
12 replacement cost as well. The two work together and in this  
13 situation liquidate the obligation to rebuild.

14 MR. PODESTA: That is correct, your Honor. And of  
15 course if they had chosen not to rebuild, they would have  
16 received actual cash value, but they chose to rebuild so  
17 payment was on a replacement cost basis.

18 THE COURT: Well, they would have breached the  
19 covenant, although the covenant is valued, as I said before, in  
20 relationship to market value. We never received proof of that  
21 value.

22 MR. PODESTA: That's correct.

23 THE COURT: But it doesn't really make any difference  
24 in this context.

25 MR. PODESTA: As to the second question, the nature

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1 and amounts of plaintiffs' insurance recoveries, the evidence  
2 strongly supports the following findings: That the entirety of  
3 WTCP's 4.091 billion in insurance recoveries should be  
4 allocated to replacement cost and business interruption lost  
5 rental income, and that all of WTC 7's insurance recoveries  
6 should be allocated to replacement cost and business  
7 interruption lost rental income except for approximately  
8 \$1 million or so, to be allocated to the personal property  
9 claim.

10 Now, in its September 2009 order, the Court ruled that  
11 the insurance proceeds that WTCP received from its insurers are  
12 allocable only to business interruption and replacement cost  
13 unless WTCP pleads and proves specific facts supporting  
14 allocations to additional components. The evidence at trial  
15 only confirms the Court's September 2009 finding. The aviation  
16 defendants have shown from the testimony of Mr. Beach --

17 THE COURT: Not quite, not quite. It really supports  
18 a finding that the insured stopped calculating once the insured  
19 hit the insurance caps. Since the primary calculation was a  
20 business interruption and replacement cost, leaving out for the  
21 moment the personal property in Tower 7, the calculation  
22 stopped. There are other categories which we may or may not  
23 value, but it's not really proper to say that there was a  
24 payment in response to an allocation because there wasn't.

25 MR. PODESTA: I'm not saying that. What I'm saying



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1 is, the evidence -- we've had shown that the only losses that  
2 either WTCP or 7 WT Co. ever documented or quantified in their  
3 submissions to their insurers were for replacement costs,  
4 actual cash value and business interruption/lost rental income.  
5 Indeed, the evidence shows that these losses were the entire  
6 focus of the claims adjustment process for both properties,  
7 including the 99-day appraisal hearing between WTCP and certain  
8 of its insurers concerning the complex.

9 And, in response, plaintiffs have failed to come  
10 forward with any specific facts that would warrant ascribing  
11 any dollar amount to any items of loss. None of the so-called  
12 TBD items were ever documented or quantified. Mr. Levy  
13 admitted in his deposition that several of them were never even  
14 incurred. And plaintiffs themselves, in their proposed  
15 allocations of settlement payments, in their Exhibit 766 and  
16 768, allocate their insurance payments only to replacement cost  
17 and business interruption.

18 The silence of the settlement agreement --

19 THE COURT: Say, that again.

20 MR. PODESTA: In plaintiffs' own exhibits -- 766 and  
21 768, which they displayed for your Honor yesterday -- 566 and  
22 568 --

23 THE COURT: That was for the purposes of economic  
24 analysis?

25 MR. PODESTA: Well, yes, for the purpose of saying how

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1 the Court should apply it.

2 THE COURT: But in a way, it says what it says --

3 MR. PODESTA: Yes. And that's why I want to make the  
4 point, that even at this trial the plaintiffs are unable to  
5 ascribe any specific value to any item of loss other than  
6 business interruption or replacement cost.

7 And the silence of the settlement agreements doesn't  
8 justify a finding that determination of the actual paid losses  
9 is impossible but merely requires examination of the underlying  
10 factual circumstances, showing that the only documented and  
11 quantified claims were for replacement cost and business  
12 interruption lost rental income. And the exchange between  
13 plaintiffs and their insurers of broad mutual releases  
14 discharging any and all claims from the beginning of time  
15 through the end of the world is typical boilerplate language  
16 that appears in any substantial settlement, or virtually any,  
17 and sheds no light on the nature of the losses actually paid.

18 So, we request that the Court find that the insurance  
19 payment should be allocated to business interruption and  
20 replacement cost except for the small personal property claim,  
21 which is the only other claim ever quantified.

22 As to the third question, the controlling legal  
23 standard is whether the collateral source payment represents  
24 reimbursement for a particular category of loss that  
25 corresponds to a category of loss for which tort damages were

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1 awarded. The aviation defendants submit that both the  
2 governing law and the expert testimony have demonstrated  
3 correspondence between plaintiffs' insurance recoveries and the  
4 potential tort damage awards.

5 The first step in this analysis is the identification  
6 of the relevant category of loss. The aviation defendants  
7 define the category of loss as lost property value, as the  
8 Court of Appeals did in Fisher; more specifically, lost  
9 property value, in the form of economic damages to plaintiffs'  
10 leasehold interest in the complex and WTC 7 resulting from the  
11 destruction of the leased buildings in the terrorist attacks.

12 As Professor Fischel testified, this characterization  
13 of the loss --

14 THE COURT: I think I'd like to refine that and see  
15 how it would work with you. When a commercial buyer buys  
16 something, he buys an asset, the asset is a long-term leasehold  
17 developed to sustain rentals. And that asset yields an  
18 expectation of income over a long period of time. So, the  
19 valuation is of the income stream produced by the asset being  
20 purchased?

21 MR. PODESTA: I think that is essentially correct.

22 THE COURT: Rather than lost property damages, I think  
23 what has happened is that the plaintiffs bought an asset,  
24 expected it to yield income, the asset was destroyed, allegedly  
25 through the negligence of your clients destroying the income

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1 flow flowing from the asset that was destroyed.

2 MR. PODESTA: Actually, I think Professor Fischel  
3 described it very similarly. What the plaintiffs lost was that  
4 they had a leasehold interest in the complex that was expected  
5 to generate rental income and the leased buildings were  
6 destroyed and as a result, they lost rental income. That's  
7 really the category of loss, and I think it's very similar to  
8 what your Honor just described.

9 Now, Professor Shavell categorized the category of  
10 loss as replacement loss and lost rental income, which matches  
11 the plaintiffs' types of insurance coverage. And if just  
12 identifying the types of insurance coverage was sufficient --  
13 was the right way to define the category of loss, one wonders  
14 why the Court of Appeals in Fisher defined the loss there as  
15 lost property value for destruction of a home rather than  
16 simply replacement cost, which was the nature of the insurance  
17 claim. In any event --

18 THE COURT: I don't follow what you said.

19 MR. PODESTA: Well, in Fisher, the Court of Appeals  
20 didn't look to the insurance payment category and say, oh, the  
21 loss is replacement cost; it defined the loss as lost property  
22 value, destruction of the home in a fire, and then inquired  
23 whether both the insurance payments and the tort damage awards  
24 corresponded to that particular category of loss.

25 THE COURT: And concluded?

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1 MR. PODESTA: The Court concluded that replacement  
2 cost insurance payments corresponded to a reduction in fair  
3 market value of the Fishers' property and completely offset the  
4 tort award.

5 But I don't think -- as Professor Fischel said, you  
6 shouldn't put too much weight on the particular burden of how  
7 the category of loss is defined. In his view, the potential  
8 tort damages awards for reduction in fair market value of the  
9 leaseholds compensated/reimbursed the plaintiffs for the  
10 economic damages they suffered on 9/11 under several  
11 classifications. And this is because an award with reduction  
12 in fair market value reflects the value of the entire stream of  
13 rental income that plaintiffs could expect over the term of  
14 their net leases. It's a one-step method, in a sense, of  
15 making the plaintiffs whole.

16 THE COURT: It creates an impediment of some sort to  
17 the asset giving rise to the income stream?

18 MR. PODESTA: The destruction does, yes.

19 THE COURT: Yes.

20 MR. PODESTA: And the reduction in fair market  
21 value --

22 THE COURT: And replacement is intended to restore  
23 that asset so that it yields the same full income stream as  
24 previously?

25 MR. PODESTA: That's exactly correct, your Honor. And

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1 when you supplement the replacement cost insurance payments in  
2 the case of a rental income-producing property with insurance  
3 for the temporary loss of rental income during the  
4 rebuilding/reconstruction period, that two-step process  
5 provides complete correspondence to the one-step process of  
6 returning to the plaintiffs the entire pre-9/11 value of their  
7 leasehold through the recovery of the reduction in market  
8 value, which is here assumed as a reduction to zero, so we  
9 would award them the full pre-9/11 market values of their  
10 leaseholds.

11 THE COURT: So, what Professor Shavell said is that  
12 economically the loss due to the 9/11 attack was in two  
13 categories, replacement cost and rental income losses. And I  
14 think it's subject to a refinement. You don't lose replacement  
15 cost.

16 MR. PODESTA: No.

17 THE COURT: Replacement cost remedy is what you lose.  
18 You lose the asset?

19 MR. PODESTA: Yes.

20 THE COURT: And the asset creates the rental income,  
21 which is lost. That's why Professor Fischel says it's one  
22 loss, not two --

23 MR. PODESTA: Right.

24 THE COURT: -- even though it's broken down into two.

25 And then he went on to say the potential categories of

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1 tort recoveries were losses of rental income but not  
2 replacement cost or property damage.

3 MR. PODESTA: I disagree with that.

4 THE COURT: Now, what Professor Shavell was doing was  
5 speaking in effect outside of his expertise.

6 MR. PODESTA: I agree with that.

7 THE COURT: He testified as an economics expert in the  
8 two categories of loss, but in terms of deciding what a Court  
9 would do in relationship to replacement cost, he was expressing  
10 a legal opinion --

11 MR. PODESTA: Right.

12 THE COURT: -- which is not within his expertise.

13 MR. PODESTA: And I think he was also failing  
14 adequately to distinguish between lost rental income, which is  
15 for the Court to award here, under replacement cost remedy,  
16 would be for the temporary rebuilding period --

17 THE COURT: I'm sorry, you're starting to mumble,  
18 Mr. Podesta. You lose some of that fire.

19 MR. PODESTA: All right. Well, you know, maybe I  
20 should have spent more time at the public defender's office,  
21 your Honor.

22 What Professor Shavell really did not always recognize  
23 in his testimony is that calling it lost rental income creates  
24 confusion between whether you're talking about lost rental  
25 income in the rebuilding period, which is what the insurance

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1 covers, and a reduction in fair market value, which is the tort  
2 remedy that covers the entire rental value of the full 99-year  
3 or 85-year remaining term of the lease.

4 THE COURT: Well, I would categorize it a little  
5 differently but essentially the same. The business opportunity  
6 recovery in insurance compensates for part of what you lost but  
7 not the whole stream of income.

8 MR. PODESTA: Right.

9 THE COURT: And in order to get the whole stream of  
10 income, you've got to replace the asset or restore the asset,  
11 which is the replacement cost part of it. So, it all works  
12 together, as Professor Fischel described it.

13 MR. PODESTA: That I believe is correct.

14 Now, there's no dispute between the parties that  
15 plaintiffs' business interruption/lost rental income insurance  
16 payments correspond to their tort damage awards measured by a  
17 reduction in fair market value. Professor Shavell testified to  
18 that, and plaintiffs' own Exhibits 566 and 568 seem to  
19 acknowledge that potential.

20 THE COURT: Would you do me a favor: Close up your  
21 notes.

22 MR. PODESTA: OK.

23 THE COURT: You are so much more effective without the  
24 notes when you're talking to me.

25 MR. PODESTA: OK.



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1 THE COURT: Your notes give you a long sentence and I  
2 can't remember the beginning of the sentence when I hear the  
3 end of the sentence.

4 MR. PODESTA: All right. Well, let me tell you, as to  
5 correspondence, there's no doubt here that the fair market  
6 value of the leaseholds will fully compensate the plaintiffs  
7 for what they lost. And the Court so found. And I have to go  
8 back to read my notes because it's a quote: "The price WTC  
9 paid for the 99-year leases it acquired from Port Authority  
10 represents a full and fair market price for the property. If  
11 WTCP is entitled to recover, recovery of the plaintiffs' market  
12 value would fully compensate it." And Professor Fischel  
13 testified to the same thing.

14 Now, Professor Shavell in his testimony agreed with  
15 your Honor's questioning, that, generally speaking, recovery of  
16 the full fair market value, pre-loss full fair market value of  
17 the leasehold would compensate property owners for their loss.  
18 But he tried to draw a distinction in this case based on the  
19 contractual obligation to rebuild. And, again, I think he was  
20 stepping a little bit outside his expertise as an economics  
21 expert because what he's overlooking -- you see what kind of  
22 rants you get when you tell me to do this?

23 THE COURT: No, I can hear you and I understand you.

24 MR. PODESTA: All right.

25 The correspondence inquiry is between tort damage

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1 awards and collateral offsets, and the problem with contractual  
2 obligation to rebuild is it doesn't fit either side of that  
3 equation. It cannot support a tort damage award --

4 THE COURT: Well, it can support insurance. You can  
5 insure a covenant.

6 MR. PODESTA: Yes, but -- that's true, but they did  
7 not insure the covenant to rebuild. And we have a stipulation  
8 to that effect, in stipulation 6 and 30, that the insurance  
9 policies, nothing in the language in the insurance policies,  
10 makes the payment of replacement cost or actual cash value  
11 dependent in any way on a contractual obligation to rebuild.  
12 And Professor Reilly, their insurance adjuster expert for the  
13 complex, testified that the insurance payments had nothing  
14 whatever to do with the contractual obligation to rebuild.

15 THE COURT: It's hard for me to understand that  
16 because, as I understand it, the insurance liquidated the  
17 obligation.

18 The Port Authority had interest that the lessee would  
19 not walk away from the property if it was destroyed, and so a  
20 covenant to replace was put into that contract, and the  
21 insurance made it liquid. After all, the owners were shell  
22 companies. So, there had to be a way that the Port Authority  
23 created liquidity as a form of assurance that those buildings  
24 would be rebuilt should there be a destruction.

25 MR. PODESTA: And that was done --

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1 THE COURT: And, therefore, I think there's a  
2 connection, notwithstanding the joint stipulation.

3 MR. PODESTA: Well, there is a connection. But the  
4 connection is, there was a covenant in the lease that WTCP and  
5 7 WTC Co. obtained the insurance and they obtained the  
6 insurance, and that fulfilled their contractual obligations,  
7 and they are getting an offset in this proceeding for the  
8 amount of the insurance payments they paid against their total  
9 insurance recovery.

10 Now, plaintiffs' principal argument against  
11 correspondence appears to be that replacement cost insurance  
12 payments are so different in nature from a tort award for  
13 reduction in fair market value, that there can be no  
14 correspondence. But both the expert testimony and a decision  
15 of the Court of Appeals in Fisher demonstrate that  
16 correspondence does exist. And I'd like to put up a couple of  
17 demonstratives to illustrate, put on the screen a couple of  
18 demonstratives.

19 And these demonstratives are just snippets from the  
20 testimony that we received over the last few days --

21 THE COURT: Do you have an extra set?

22 MR. PODESTA: Yes.

23 THE COURT: We can take two copies.

24 MR. PODESTA: And the first set of snippets -- and  
25 these are just snippets from the testimony; we could have found

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1 many more but you can't fit so many on the screen. The first  
2 snippet shows the agreement of Professors Fischel and Shavell  
3 as to the proposition that the market value of commercial  
4 rental property, such as the complex and WTC 7, is determined  
5 largely by the net present value of their anticipated rental  
6 income streams. I don't think that's really much of a dispute,  
7 but it's an important point in a correspondence equation.

8 Then if we can turn to the second demonstrative, which  
9 relates to the fact that plaintiff -- the testimony agrees that  
10 plaintiffs' replacement cost insurance proceeds provided them  
11 with funds to rebuild and assist in retenancing the destroyed  
12 properties. And there you see we have testimony to this effect  
13 from Mr. Beach and Professor Fischel. And in response --

14 THE COURT: I think this is an important point.  
15 Shavell says, answering a question I put to him: "What's the  
16 connection?"

17 "Well, the connection is that you can't begin to enjoy  
18 an interrupted income stream unless you fork out the money for  
19 replacement."

20 MR. PODESTA: A very practical statement by a Harvard  
21 law school professor and a distinguished economist, forking out  
22 the money for replacement, but that is exactly the point.

23 THE COURT: That in effect showed the correspondence  
24 both to the income stream and the replacement cost.

25 MR. PODESTA: That's one of the reasons we put that

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1 snippet up there, in the hopes of persuading your Honor, of  
2 that.

3 And I'd like to show you the third -- that's generally  
4 been my objective throughout.

5 And, thirdly, I'd like to show the demonstrative that  
6 establishes agreement on the point that rebuilding the  
7 destroyed properties would enable plaintiffs to rent out the  
8 buildings once again and restore their lost rental income  
9 stream. And here we have multiple admissions of this point,  
10 from statements by Mr. Beach and Professor Fischel and several  
11 admissions or acknowledgments by Professor Shavell, plaintiffs'  
12 expert, of precisely this point, in the course of an excellent  
13 examination conducted by someone other than the defense  
14 lawyers. And I think this is a critical point: The  
15 correspondence is established -- a critical point is  
16 established in correspondence is if rebuilding the destroyed  
17 properties will enable the plaintiffs to rent out the buildings  
18 once again and restore their rental income stream.

19 I know this is exactly the same type of  
20 relationship -- between replacement cost insurance payments and  
21 reduction in fair market value -- that the Court of Appeals  
22 found sufficient in Fisher to support correspondence. In that  
23 case, replacement costs weren't exactly the same as reduction  
24 in fair market value, but the replacement cost insurance  
25 proceeds were found to correspond because they provided the

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1 Fishers with most of the funds they needed to rebuild their  
2 home and thereby to restore the market value of the property.

3 THE COURT: I think, on this screen, that the Fischel  
4 testimony at page 206 lines 9 to 19 and Beach's testimony at  
5 page 116 line 16 to 25 express the point you're making very  
6 well, namely, that the purpose of both business interruption  
7 and replacement costs go hand to hand. The replacement cost  
8 restores the asset to the full income stream and until it does  
9 so, business interruption compensates the insured for that lost  
10 income stream.

11 MR. PODESTA: Exactly.

12 THE COURT: So, the combination of the two restores  
13 the full value of the asset that was paid for before the  
14 catastrophe.

15 MR. PODESTA: Exactly. That sums up the defense case  
16 very well.

17 Now, Fisher -- you've heard a lot about Fisher over  
18 the last five years or longer -- it does provide important  
19 support for the defense case because --

20 THE COURT: That's Fisher, the New York Court of  
21 Appeals case?

22 MR. PODESTA: Yes. Fisher v. Qualico.

23 -- in that case the Court unanimously held that the  
24 Fishers' replacement cost insurance proceeds corresponded to,  
25 and entirely offset, their lesser of two tort damage award --

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1 THE COURT: The problem with Fisher is that it was not  
2 an income-producing property, it was a home, and you can't  
3 glean from Fisher the combination of the two. The plaintiffs  
4 have conceded that there is a correspondence between business  
5 interruption and lost income --

6 MR. PODESTA: Correct.

7 THE COURT: -- and, therefore, the fight between the  
8 two of you is whether or not there is correspondence between  
9 replacement cost. I leave out all the others. They were not  
10 valued, and if they were not valued, I can't value them. They  
11 were all wrapped together in a release -- that's true -- but  
12 they were not given any value by Shavell, plaintiffs'  
13 economist, and they can't be given any value by me because  
14 they've never been quantified.

15 Besides the numbers are not really big, and besides,  
16 also, if they were an element of loss, they could be added to  
17 the market value, and, again, they weren't proved.

18 MR. PODESTA: That's correct.

19 THE COURT: If one loses an income-producing asset,  
20 plus improvements that can increase the value of that asset,  
21 then your tort recovery encompasses both. And so all the  
22 tenant fixtures and the personal property and the Frank Stella  
23 paintings, all of that could have been the subject of tort  
24 recovery insurance.

25 MR. PODESTA: Well, tenant improvements were included

D7ikwtc

Closing - Mr. Podesta

1 in replacement cost --

2 THE COURT: I understand, I understand.

3 MR. PODESTA: -- but otherwise, I agree with you.

4 But one of the big points -- let me move away from my  
5 notes -- that we have working for us in Fisher is that Fisher  
6 found correspondence between replacement cost and reduction in  
7 fair market value, as the issue in dispute here. It didn't  
8 have to address, because it wasn't dealing with a rental income  
9 property, correspondence between what do you do when you have  
10 lost rental income. But here we have business interruption  
11 lost rental income insurance that WTCP admits corresponds to  
12 their temporary loss of rental income claim and corresponds to  
13 a portion of the reduction in fair market value.

14 So, I think we're not worse off on correspondence than  
15 defendants were in Fisher; we're better off because we have two  
16 different insurance streams that compensate for the two  
17 different portions of plaintiffs' claim replacement cost and  
18 business interruption lost rental income.

19 Now, if you can bear with me for a minute, I would  
20 like to put up two snippets from Fisher itself.

21 Plaintiffs' argument has long been that there are two  
22 different categories of loss here, replacement cost and  
23 diminution in value, and they don't offset. But if your Honor  
24 looks at this snippet, the Court of Appeals is describing the  
25 Fishers' argument. It was exactly the same argument: Cost of



D7ikwtc

Closing - Mr. Podesta

1 restoration and diminution in market value represent two  
2 different categories of loss, and replacement cost insurance  
3 proceeds correspond only to the first.

4 But what was the Court of Appeals' response? If you  
5 can flash that up, Mr. Campbell. It's measured in our case  
6 law. Replacement cost and diminution in market value were  
7 simply two sides of the same coin. "Two sides of the same  
8 coin" is not phrasing consistent with two different categories  
9 of loss. Each is a proper way to measure lost property value,  
10 the lower of the two figures affording full compensation to the  
11 owner. That's our case here. And the conclusion: The  
12 collateral source payment, the replacement cost insurance  
13 proceeds thus correspond to the property loss and are properly  
14 offset against the damage award.

15 And I'd add only: Look at the Court's language. It's  
16 defining the category of loss in the fourth line, highlighted  
17 as lost property value and in the next to last line,  
18 highlighted as property loss.

19 Now, in his opening, Mr. Williamson gently chided us  
20 for paying insufficient attention to the requirement of direct  
21 and close correspondence under the case law. But the case he  
22 cited for that was Fisher. And Fisher necessarily found the  
23 required direct and close correspondence between replacement  
24 costs and diminution in fair market value or it would not have  
25 reached the unanimous result that it did.

D7ikwtc

Closing - Mr. Podesta

1           Mr. Williamson also claims that we disregarded Oden,  
2 but we haven't disregarded Oden. We've cited it for the  
3 general --

4           THE COURT: Disregarded what?

5           MR. PODESTA: Oden v. Chemung County, which is a 1995  
6 Court of Appeals decision, it's a personal injury case  
7 involving correspondence between I believe pensions and lost  
8 future earnings, and found no correspondence.

9           But the reason we focus on Fisher is not only because  
10 it helps us, which is one of our motives, but because it helps  
11 us --

12          THE COURT: Well, you're not right because you have to  
13 focus not only on cases that help you but those that hurt  
14 you --

15          MR. PODESTA: And that's what I'm trying to do.

16          THE COURT: -- like Oden.

17          MR. PODESTA: There aren't that many that hurt us  
18 here. But Fisher important because it deals with -- at least  
19 none that I would admit, your Honor -- deals with  
20 correspondence in the context of real property interest, fair  
21 market value, and replacement cost.

22          THE COURT: Talk about Oden.

23          MR. PODESTA: Moreover, the Second Circuit in Turnbull  
24 rejected the proposition that Oden requires a  
25 damage-item-by-damage-item analysis for correspondence

D7ikwtc

Closing - Mr. Podesta

1 purposes.

2 THE COURT: Tell me about Oden.

3 MR. PODESTA: Pardon me?

4 THE COURT: Tell me about Oden.

5 MR. PODESTA: Oden was a case, I believe, that  
6 involved a personal injury case, and there was a claim for  
7 future lost earnings that it was awarded by the jury. And the  
8 defendant argued that the plaintiff's pension benefits should  
9 be offset against the future lost earnings award. And the  
10 Court of Appeals said, no, he would have gotten the pension  
11 benefits independent of whether he had been able to work, and  
12 found no correspondence.

13 And I think that's correct. We don't take any issue  
14 with that.

15 THE COURT: That was a disability case?

16 MR. PODESTA: Yes, there was a disability, that was an  
17 allegation.

18 Now --

19 THE COURT: The argument was made that because he's  
20 disabled he loses his earning power, and by getting the  
21 pension, it's a replacement of earning power?

22 MR. PODESTA: That's what the defendants argued.

23 THE COURT: And in effect the Court of Appeals  
24 reasoned that the two were dissimilar?

25 MR. PODESTA: Yes, the Court of Appeals --

D7ikwtc

Closing - Mr. Podesta

1 THE COURT: One can earn money in many different ways  
2 and it's not an offset against the pension that you earn the  
3 money, and it's not an offset against the earning of the money  
4 that you got a pension?

5 MR. PODESTA: For example, when I retire from  
6 Debevoise, if this case ever concludes, I will be able to  
7 collect a pension, hopefully, but I could go out and work as a  
8 professional golfer and earn money. And if I was injured such  
9 that I could no longer putt, I would still have a claim for  
10 lost future earnings as a professional golfer, if only I were  
11 so fortunate as to be able to prove my earnings capability in that  
12 regard.

13 But Turnbull basically described the standard for  
14 correspondence as a showing with reasonable certainty that the  
15 judgment includes an award for damages that falls within a  
16 certain category of loss and the plaintiff receives collateral  
17 source payment that reimburses him for a corresponding category  
18 of loss. We believe that we have met that test.

19 THE COURT: What kind of case is Turnbull?

20 MR. PODESTA: Turnbull was another lost earnings case.  
21 And it rejected the notion you have to look at each individual  
22 item to find correspondence, and it did find correspondence  
23 between the offset payment in that case -- and I forget  
24 precisely which one it was -- and the plaintiffs' lost earnings  
25 claim.

D7ikwtc

Closing - Mr. Podesta

1 THE COURT: What was the collateral source there?

2 MR. PODESTA: Pardon me?

3 THE COURT: What was the collateral source?

4 MR. PODESTA: You know, frankly -- well,

5 Ms. Weisgerber is handing me the Oden decision and the  
6 collateral source there -- it is a Second Circuit opinion, so  
7 it requires a little bit of scrutiny -- Social Security  
8 benefits. I didn't get that from reading the opinion but  
9 Ms. Weisgerber whispered me the answer, which is good.

10 I'd like to conclude with a few words about  
11 allocation --

12 THE COURT: How did Turnbull decide, no  
13 correspondence?

14 MR. PODESTA: I think it remanded to the district  
15 court, saying, here's the test, you figure it out. It was:  
16 Future lost earnings award and disability claimants were  
17 intended to compensate plaintiff for the same category of loss,  
18 you figure out, district court, how to do it. Judge Skretny in  
19 the Western District of New York.

20 A few words about allocation and then I will sit down:  
21 As Professor Fischel testified, there's no need for the Court  
22 to engage in a mathematical allocation of plaintiffs' total  
23 insurance recoveries between replacement cost and business  
24 income payments, for a very simple reason -- they both satisfy  
25 the 4545(c) correspondence standards, and the mathematical

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Closing - Mr. Podesta

1 exercise serves no real point.

2 The personal property claim for \$1 million for 7 WTC  
3 Co. was a little different because it's a separate type of  
4 claim that's independent of the damages to the net leasehold  
5 interests. And, on the other hand, it's unquestionably covered  
6 by the insurance payments. Mr. Levy admitted that. And no one  
7 denies that personal property insurance payments correspond to  
8 personal property losses.

9 THE COURT: What should I do with the personal  
10 property of Tower 7?

11 MR. PODESTA: Well, there's two things you can do.  
12 You can take my approach, which is to say, look, there's  
13 \$831 million in total insurance recoveries, \$737 million in a  
14 tort claim for the leasehold, 1.8 million for personal  
15 property, there's plenty of insurance left over, even after 3  
16 or 4 million in offsets for claims processing -- it's all  
17 covered. There's no doubt the personal property claim is  
18 covered by the settlement, and there's no indication that IRI  
19 ever raised the slightest dispute as the quantification of the  
20 amount of that claim.

21 THE COURT: Is there a correspondence with the  
22 personal property?

23 MR. PODESTA: Yes. It's personal property insurance  
24 payments for a personal property loss. No one has ever  
25 questioned correspondence on that.

D7ikwtc

Closing - Mr. Podesta

1 THE COURT: So, there is or there isn't?

2 MR. PODESTA: There is correspondence. There's no  
3 question as to --

4 THE COURT: What aspect of tort recovery would have  
5 given you that personal property?

6 MR. PODESTA: It would just be a straight negligence  
7 claim; you can sue for damage to your personal property.

8 THE COURT: So, it would be in addition to market  
9 value of the real property?

10 MR. PODESTA: Right, so you sue for the damage to the  
11 net leasehold value for the real property and you sue for the  
12 damage to your personal property.

13 THE COURT: So, to the extent I've held that the full  
14 limit of recovery was the real estate value, I've got to adjust  
15 that by adding personal property?

16 MR. PODESTA: \$1.8 million, yes, that's correct.

17 THE COURT: So, there's a perfect match, right,  
18 there's a perfect match?

19 MR. PODESTA: Yes. The other way to do it is the way  
20 plaintiffs suggest, which is to do the allocation from  
21 Exhibit 766 and 768. And by their calculation -- and if you  
22 have to allocate, it's a practicable way to do it -- you would  
23 wind up with the plaintiffs having still a claim of like  
24 \$900,000 and change for personal property that they could add  
25 to their \$300,000 claim in fine arts, which would survive the

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Closing - Mr. Podesta

1 trial as to WTC 7, but there are no such little hanging claims  
2 as to the complex, so those claims would be entirely offset.

3 THE COURT: I'm not following. What should I do with  
4 the Frank Stella paintings, hold correspondence or not?

5 MR. PODESTA: Well, the correspondence has been  
6 stipulated to. It's a million-dollar claim and there's  
7 \$700,000 of insurance, so there's 300,000 left or about  
8 \$300,000 left. And that claim will survive --

9 THE COURT: And I think Mr. Barry is going to pay  
10 that.

11 MR. PODESTA: Pardon me?

12 THE COURT: And I think Mr. Barry is going to pay  
13 that.

14 MR. PODESTA: I think I've just about persuaded him to  
15 pay it out of his own pocket even if the clients don't.

16 But apart from --

17 THE COURT: And on the personal property, there's  
18 correspondence?

19 MR. PODESTA: Yes. Apart from that minor point, the  
20 principal lesson I take from Exhibits 566 and 568 is that the  
21 replacement cost insurance payments alone, whose offset was  
22 approved in Fisher, are sufficient by themselves to offset all  
23 of the complex claim and about 85 percent of the WTC claim with  
24 the remainder of the WTC claim being offset by rental income  
25 payments as to which correspondence is not disputed.



D7ikwtc

Closing - Mr. Podesta

1 THE COURT: You know, I have trouble with allocations  
2 because there's dissimilarity. In the four main properties,  
3 there was an appraisal which reduced a higher number of claim  
4 for replacement cost. And there was no appraisal or any other  
5 kind of adverse relationship that gave me some kind of  
6 reliability with regard to the business interruption. So, it's  
7 hard to draw a ratio; and even more so in Tower 7, because  
8 there never was any kind of an appraisal proceeding on anything  
9 there.

10 MR. PODESTA: That's why we believe that the most  
11 appropriate course is not to allocate, because it's  
12 unnecessary, there's correspondence as to all the categories of  
13 loss except for the special case of fine arts, which was  
14 covered by an entirely different policy and --

15 THE COURT: You wanted to reserve 15 minutes?

16 MR. PODESTA: Yes. I doubt that I will take 15  
17 minutes.

18 THE COURT: You've got to stop, though.

19 MR. PODESTA: I stop.

20 THE COURT: OK. We will have a ten-minute break.  
21 Then we'll hear Mr. Williamson.

22 (Recess)

23 THE COURT: It's 12:00 o'clock, Mr. Williamson.

24 You may begin.

25 MR. WILLIAMSON: Thank you, your Honor.

D7ikwtc

Closing - Mr. Williamson

1 Good morning, your Honor, Counsel.

2 We examined the evidence that's been presented at this  
3 trial. We respectfully submit that it shows the defendants  
4 want it both ways -- they want to escape the replacement cost  
5 damages, as replacement cost claims have been dismissed, since  
6 there's no proximate cause; they want to talk plaintiffs'  
7 replacement cost insurance recoveries and use them to reduce  
8 their potential tort damages for lost rental income.

9 The defendants have argued vociferously for years that  
10 they should not be held liable for the costs of rebuilding the  
11 World Trade Center complex. Having convinced the Court of  
12 that, having convinced the Court that there's no proximate  
13 cause and therefore they're not liable for the replacement  
14 costs, they escaped responsibility for the rebuilding effort.

15 Now, in this trial, we submit, they want to siphon off  
16 those insurance coverage recoveries for replacement costs and  
17 use them, as I said, to offset lost rental income losses. The  
18 defendants want to start with the rebuilding -- it violates  
19 economic principles, it violates common sense, as the trial has  
20 shown, and, most importantly, as I'll discuss, it violates CPLR  
21 4545.

22 Previously, your Honor, on four occasions you found  
23 defendants have failed to meet their burden of proof and you  
24 denied the summary judgment motion seeking total correspondence  
25 finding, in total dismissal. We submit there's been no new

D7ikwtc

Closing - Mr. Williamson

1 evidence adduced at trial that should change that result.

2 I'd like to discuss the major flaws in defendants'  
3 analysis. First, defendants conflate distinct insurance  
4 coverages. As you'll recall, Mr. McKinley was asked, are there  
5 separate categories of insurance coverage for separate  
6 categories of risk, and he explained that there are. He  
7 explained you pay different premiums for those coverages  
8 because they're different and they cover different risks.

9 Professor Fischel wrongly lumped the insurance  
10 categories of coverage together as though they didn't matter.  
11 Let's take a look at how your Honor treated them earlier last  
12 year. Your Honor took the insurance recoveries, and you  
13 analyzed them and broke them into categories of insurance  
14 recoveries, as you're supposed to do under the prevailing case  
15 law. And you found they mainly fell into two categories, as  
16 you know, property damage insurance to defray the cost of  
17 rebuilding leased properties, and then business interruption  
18 insurance separately, to cover the lost revenue losses.

19 Oden says that the way your Honor did it was correct,  
20 the way the defendants and their expert did it was wrong  
21 because collateral sources are not to be treated as fungible.  
22 You don't just move them around.

23 (Continued on next page)

24

25

D7i2wtc2

Summation - Mr. Williamson

1 MR. WILLIAMSON: Your Honor is supposed to come away  
2 with the impression from this trial -- and we heard it again  
3 today -- that World Trade Center Properties actual economic  
4 losses won't be that great, so it is not so bad if you find  
5 total correspondence.

6 And you heard discussion during the trial, when that  
7 was presented, that the losses really were much less. And your  
8 Honor alluded to that today, referring to the appraisal  
9 findings, in an exhibit that defendants created. As will be  
10 shown, the defendants dramatically understated the real losses.  
11 How did they do it? They did it in a couple of ways.

12 First, they gave you an appraisal number for as far as  
13 the appraisal panel got and said, Use that number. That will  
14 be good. That's 4.1 billion. Of course, as we are going to  
15 see in a minute, that was only partial and it left out tenant  
16 improvements. That was the point of introducing into evidence,  
17 at your Honor's request, the exhibit that showed the amount of  
18 tenant improvements for each of the buildings, the main site  
19 and also for 7.

20 The next way they did it was they took an artificial  
21 early cutoff date for lost rents. They only took them out to  
22 the end of 2007; but this is 2013, so we have six more years of  
23 lost rents.

24 So let's take a look at the slide they showed you.  
25 You will see, when you add them all up, you will see that you

D7i2wtc2

Summation - Mr. Williamson

1 were supposed to come away with the impression that the total  
2 actual losses --

3 THE COURT: What are the six years for?

4 MR. WILLIAMSON: I'm sorry?

5 THE COURT: What are the six years for?

6 MR. WILLIAMSON: From 2007 to the present is the  
7 point.

8 THE COURT: Why is that relevant?

9 MR. WILLIAMSON: Because that's lost rent damages.  
10 The jury would have to ultimately determine how much to award  
11 for lost rent damages. The computation you were given only  
12 goes up to the end of 2007. That's the point.

13 THE COURT: This will be the tort claim?

14 MR. WILLIAMSON: In tort, yes, the jury would decide;  
15 obviously governed by your Honor's ceiling, but it is just  
16 inaccurate to tell you this is all the damages.

17 THE COURT: I don't think that's what a jury does. I  
18 don't think that's what my instructions would be. I wouldn't  
19 ask them to add up all the rental income they lost. I would  
20 ask the jury to find out what the value of the building was as  
21 at 9/11/01; and, because of the failure of proof, I would say  
22 it is the same as the amount that was paid at the auction.

23 But if you wanted to value the contract, I don't know  
24 how I would feel with that. The contract obligation is just,  
25 in a sense, like the assumption of a mortgage. It is a debt of

D7i2wtc2

Summation - Mr. Williamson

1 some type, and it has to be valued. It might increase the  
2 value of the property without that, but you didn't take  
3 advantage of the opportunity.

4 MR. WILLIAMSON: Well, let me first point out that it  
5 is an economic loss. And let me comment, because your Honor  
6 did mention that we hadn't put in evidence of certain types of  
7 damages, but that's not the purpose of this proceeding.

8 THE COURT: No, that's not the purpose of this  
9 proceeding, but we are working against a potential tort  
10 recovery of \$2.805 billion. That's why it is relevant.

11 MR. WILLIAMSON: So defendants would have you believe  
12 that 5.5 billion is really the total amount of actual losses  
13 suffered here, so there is no great injustice by finding total  
14 correspondence. Actually, when you do the math, and you add in  
15 the things that they left out --

16 THE COURT: Technically, it is the proof of claim of  
17 reimbursement which was accepted by the insurance company  
18 because it was in excess of the amount of insurance.

19 MR. WILLIAMSON: Yes, and you end up with well over 8  
20 billion; not 5.5, well over 8 billion. If your Honor decides  
21 to take that and subtract from it the 2.805, you still don't  
22 end up with any windfall for the plaintiffs. Actually, what  
23 happened here is because of the insurance limits, the  
24 plaintiffs were only able to recover less than half of their  
25 actual economic losses.

D7i2wtc2

Summation - Mr. Williamson

1 THE COURT: You are matching dissimilarities.

2 MR. WILLIAMSON: I beg your pardon?

3 THE COURT: You are matching dissimilarities.

4 MR. WILLIAMSON: For the purposes of trying to  
5 convince your Honor there are no real economic losses here that  
6 don't exceed the amount of available recoveries, that's just  
7 not correct. That's what I am attempting to do, to dispel that  
8 myth, if you will.

9 So what you have been given, when you add it together,  
10 you get a little over \$7 billion for actual, documented  
11 replacement costs -- four volumes of documentation are in  
12 evidence -- and then you have the lost rental income, and they  
13 add it up and get it to \$5.05 billion.

14 If you go back up, please, Mr. McLeod, to the top  
15 part, you could see here, the panel itself, this exhibit itself  
16 says "partial property damage," because they know tenant  
17 improvements have been left out. And Mr. McKinley explained  
18 the tenant improvements are what remains when a tenant moves  
19 out, and they have value. If you look at Exhibits 572 and  
20 573 --

21 THE COURT: They don't necessarily add value. They  
22 sometimes diminish value.

23 MR. WILLIAMSON: Well, but they have a value.

24 THE COURT: Tenant improvement fits the particular  
25 tenant that's in the lease; but when the tenant leaves the

D7i2wtc2

Summation - Mr. Williamson

1 lease, customarily many leases will require the tenant to  
2 remove all those furnishings and so-called improvements and the  
3 next tenant will negotiate for some kind of allowance because  
4 that tenant will want to change things to fit the next tenant.  
5 So it is arguable whether these are improvements or not but  
6 they can be insured and we are not talk about this as a  
7 component of either the recovery in tort or the insurance. It  
8 seems to be a wash that's neutral.

9 MR. WILLIAMSON: We submit, your Honor, that actually  
10 the tenant improvements are part of replacement cost. That was  
11 brought out during cross-examination.

12 THE COURT: It's not necessarily that. They were  
13 included and they were never challenged because it was  
14 academic. They were not excepted.

15 MR. WILLIAMSON: It's because they didn't get to it.

16 THE COURT: That's what I am saying. They never got  
17 to it.

18 MR. WILLIAMSON: The point is, that's another 1.8  
19 billion on the main site, another 400 million on the 7 World  
20 Trade Center -- 540 million, excuse me. You had asked for  
21 those numbers and we gave you those numbers. So you see that  
22 the total claim adds to a much greater amount. So even if the  
23 jury were to award the plaintiffs \$2.805 billion, the point is,  
24 the plaintiffs will not end up with a windfall. And we  
25 provided your Honor the same evidence --



D7i2wtc2

Summation - Mr. Williamson

1 THE COURT: "Windfall" is a very bad term,  
2 Mr. Williamson. It is an epithet. It follows a legal  
3 conclusion, and it is not very useful in terms of argument in  
4 terms of legal analysis.

5 MR. WILLIAMSON: Very well, your Honor.

6 With respect to 7 World Trade Center, we provided you  
7 the same data and it shows the actual economic losses, when all  
8 added together, come out to a little over 1.5 billion.

9 Flaw number 3, defendants wrongly claim there was only  
10 a single category of loss, and you heard some discussion of  
11 that. Remember, we showed you in their brief that if you  
12 define the category of economic loss the same as you define the  
13 category of insurance recoveries and you force them both into  
14 the exact same one category, of course you get a 1:1 ratio, and  
15 that's what they did. It creates a foregone conclusion.

16 Professor Shavell explained that his analysis revealed  
17 that there were multiple categories of loss. They were  
18 distinct and additive economic losses.

19 Interestingly, in *Oden*, which your Honor asked about,  
20 the court took a look at the argument being advanced here. In  
21 that case it was appellant Streeter presenting that argument.  
22 As your Honor will recall, it was rejected. They said,  
23 "Relying on the view of the language and purposes of the  
24 statute, Streeter" -- in this case we would submit the aviation  
25 defendants -- "argues that CPLR 4545(c) requires the court to

D7i2wtc2

Summation - Mr. Williamson

1 reduce the total award for economic loss by the total amount of  
2 collateral source payments for economic loss."

3 Then let's take a look at what the plaintiff was  
4 arguing. "In contrast" -- still *Oden* -- "plaintiff contends  
5 that the award for economic loss should be broken down into  
6 categories" -- just the same as we contend -- "and the  
7 reduction for collateral source payments should then be made  
8 only in those categories that correspond to analogous  
9 collateral source categories." And then the court found that  
10 plaintiff was correct. We submit that that's the analysis we  
11 have been advocating, it is the analysis Professor Shavell  
12 used. It's not the analysis that defendants or Professor  
13 Fischel have used.

14 Also, your Honor has already found that WTCP suffered  
15 different categories of loss on the morning of September 11.  
16 So different categories of loss have already been established,  
17 and it really can't be ignored because it is your Honor's  
18 holding.

19 Fundamental flaw number 4 we have identified, among  
20 others, is the defendants ignore the fact that the insurance  
21 recoveries were for more than just categories of replacement  
22 costs and business interruption.

23 THE COURT: Those are the only ones that were  
24 quantified.

25 MR. WILLIAMSON: Correct. But, as your Honor said at

D7i2wtc2

Summation - Mr. Williamson

1 the trial, when evidence was adduced of other losses, you said,  
2 "I am prepared to find that part of the settlement money was  
3 paid for potential claims." You recognized that. You  
4 recognized that as, frankly, you had to, I submit, because some  
5 of the insurers, as we noted and the proof showed, paid more  
6 than their policy limits. So that --

7 THE COURT: Weren't there defense costs involved in  
8 those policies?

9 MR. WILLIAMSON: In some of them I think prejudgment  
10 interest was an issue, bad-faith claims, delay in making  
11 payments.

12 THE COURT: Bad faith would required everybody to pay,  
13 and not everybody paid more than the policy limits.

14 MR. WILLIAMSON: That is correct.

15 THE COURT: So not all the insurance clauses in all  
16 the policies were the same. Some insurers --

17 MR. WILLIAMSON: Correct.

18 THE COURT: Some insurers presumably had -- and I  
19 didn't study them -- some insurers had obligations to pay  
20 defense costs. Some insurers had some other components of  
21 claim. Nobody paid more than 2 percent of face value --

22 MR. WILLIAMSON: I'm sorry. These did not --

23 THE COURT: -- it was *de minimus*.

24 MR. WILLIAMSON: Sorry. These did not involve defense  
25 obligations. These weren't defense policies. These were

D7i2wtc2

Summation - Mr. Williamson

1 claims for the property damage and the business interruption  
2 losses and other losses that were suffered and then led to the  
3 lawsuits.

4 THE COURT: I don't know why -- and I don't think you  
5 know why -- that some insurers paid a little more. Some threw  
6 in the policies. Some paid a little more, but never more than  
7 2 percent more.

8 MR. WILLIAMSON: But it certainly debunks the notion  
9 that insurers never pay, which Mr. Beach kept saying, unless  
10 the claim is documented --

11 THE COURT: It doesn't debunk anything.

12 MR. WILLIAMSON: -- and quantified.

13 THE COURT: It doesn't debunk anything. The  
14 sequence -- and all we have is sequence, because there were no  
15 findings -- we have a sequence that there four towers; two  
16 categories that were quantified, nothing else; and for the  
17 Tower 7, there were four categories.

18 MR. WILLIAMSON: We also have --

19 THE COURT: The other two being the Stella paintings  
20 and personal property. And then there was an insurance payment  
21 of a settled insurance cap based on the -- some of the policies  
22 having or being susceptible to the finding of a two-occurrence  
23 loss.

24 So I don't know what I can get out of this. I can't  
25 get anything. The insurance payments were made, and the only

D7i2wtc2

Summation - Mr. Williamson

1 thing that was quantified were those that I mentioned. So  
2 presumably the payments were made against those  
3 quantifications. But there was no point in going forward  
4 because the quantifications exceeded the policy limits. How  
5 could I allocate if there is nobody who quantified when it  
6 mattered? I don't know --

7 MR. WILLIAMSON: I understand -- sorry.

8 THE COURT: I don't know how to do it.

9 MR. WILLIAMSON: I understand the issue, but your  
10 Honor had recognized and said you were prepared to find that  
11 part of the monies were paid for these potential claims, and it  
12 makes sense.

13 THE COURT: Everything has a potential value in life,  
14 everything. Because we all understand there is no free lunch.

15 MR. WILLIAMSON: That's true.

16 THE COURT: You have to pay for it or allocate  
17 something to pay for something else to go to this as well. But  
18 I can't quantify something that's not been quantified.

19 MR. WILLIAMSON: I understand, your Honor. And I  
20 certainly learned early in life there is no such thing as a  
21 free lunch, but it is their burden to show that, your Honor.

22 THE COURT: Unless you work for somebody else, but  
23 it's not free in any event.

24 MR. WILLIAMSON: Right. Fair enough.

25 Flaw number 5, let's examine that. Defendants' theory

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Summation - Mr. Williamson

1 is that the only loss was the World Trade Center's  
2 income-producing potential, just the loss of the income stream.  
3 That's it. That's all we have to worry about. The buildings,  
4 separate and apart from the loss of income stream --

5 THE COURT: I think I have refined my thinking on  
6 that. This loss is the asset that is capable of producing the  
7 income stream.

8 MR. WILLIAMSON: We think there are two discrete --

9 THE COURT: So compensation can involve two different  
10 aspects of it -- replacing the income stream on an absolute,  
11 independent sense, and enabling the insured to restore his  
12 property, restore the asset. So you could say they are both  
13 components of the same thing, you can say they are different  
14 components, but I don't know that it adds to our analysis.

15 MR. WILLIAMSON: Let me explore that if I may. I  
16 deliberately asked Professor --

17 THE COURT: What was lost by your clients was the  
18 ability to enjoy that which they paid for. What they paid for  
19 was an income stream produced by a leased asset. The leased  
20 asset was destroyed, and so they got from the insurance company  
21 money that tided them over until a reasonable replacement  
22 should have been put in, not 70 years, but counting from some  
23 period related to the catastrophe. And that was a totally  
24 reimbursement for their loss as of 9/11/01, not later in time,  
25 but then.

D7i2wtc2

Summation - Mr. Williamson

1           And as of the structure, that was about 25 years old  
2           at the time. That was the age of the building. 7 was even  
3           older. So that was what was restored by insurance and the  
4           question is, does that correspond with what they would have  
5           gotten from the law? Frankly, it seems to me that there is  
6           that correspondence because the lost income stream that is paid  
7           by work by business interruption is a temporary item, as  
8           Professor Shavell stated. It's a temporary item. And in order  
9           to enjoy the full benefit of the income stream, you have to get  
10          a recapture or restoration, not a recapture, restoration of the  
11          property that produces that stream. They all fit together, and  
12          I think that makes for correspondence.

13           What you would get if you were a plaintiff in the  
14          situation that your clients were would be the value of that  
15          which was lost, and that was valued at \$2.805 billion. You  
16          could take that money and you could buy other properties, you  
17          could put it in the bank, you could take a sail around the  
18          world, you could do anything that you wanted, but that's all  
19          you would have gotten.

20           In this context, he saw fit, because of contract  
21          obligations and something else, to stay with what he had and he  
22          got the business interruption and the replacement cost to do  
23          that and to restore the income stream that he had purchased.

24           So it seems everything matches.

25           MR. WILLIAMSON: Let me try to pursue that. We

D7i2wtc2

Summation - Mr. Williamson

1 submit, as you know, that there are discrete losses. I gave  
2 Professor Fischel a hypothetical, as you will recall, about the  
3 henhouse.

4 THE COURT: He really couldn't figure that henhouse.

5 MR. WILLIAMSON: No, he couldn't. Let me explore it.  
6 I asked him if the henhouse is destroyed, what's the loss? He  
7 said the only loss is the value of the egg-producing income  
8 stream.

9 THE COURT: In other words, to the extent the hens  
10 produce eggs and to the extent that the eggs are the only  
11 income stream, if you replace the hens with other hens, that  
12 give birth to the same number -- not give birth, that issue the  
13 same number of eggs -- you can't give birth because you can't  
14 eat fertilized eggs -- then you have a replacement.

15 MR. WILLIAMSON: But the point is --

16 THE COURT: Then you have a match, income stream. You  
17 get insurance to tide you over until you can find all the hens  
18 you want. I don't think it helps very much.

19 MR. WILLIAMSON: We submit that it shows that there  
20 are three different categories of economic losses in that  
21 example, and he only identified one, because he needs to have  
22 just one for correspondence. He left out the hens and he left  
23 out the henhouse itself. We submit that makes it a  
24 self-fulfilling prophesy that you will get total  
25 correspondence.



D7i2wtc2

Summation - Mr. Williamson

1 I think your Honor's comment on your Honor's analysis  
2 that you were setting forward earlier, there really are two  
3 discrete categories of losses. Because if you have lost rental  
4 income and you have insurance that you paid separate payments  
5 for to get that and you file a separate loss for that, you get  
6 however much you get on your insurance claim. That's for that  
7 category of loss.

8 THE COURT: Of course it is distinct. You pay  
9 separate premiums and you are getting two values. But let's  
10 assume that you have an insurance policy that paid you total  
11 lost income and an insurance policy that paid you full  
12 replacement value. You would be getting more than your loss.

13 MR. WILLIAMSON: We submit no, because you have two  
14 different categories of losses.

15 Let me pursue --

16 THE COURT: You really don't. You lost what you paid  
17 for. You paid \$2.8 billion to get an income producing asset  
18 and you lost the assets, you lost the \$2.8 billion. To get it  
19 back, you would need either of loss of income -- you got \$2.8  
20 billion present value of lost income. You don't care about  
21 replacement value.

22 MR. WILLIAMSON: Except here --

23 THE COURT: And if you have got full replacement value  
24 plus the income that you lost until it was replaced, you get  
25 double recoveries that way. They have to work together. They

D7i2wtc2

Summation - Mr. Williamson

1 are complementary. That's the purpose of the insurance. You  
2 buy separate insurance, but the separate insurance is  
3 complementary, and that's what your argument is missing.

4 MR. WILLIAMSON: We submit we are insuring different  
5 losses.

6 If we look at flaw number 6, defendants have confused  
7 tort defense issues with insurance correspondence issues, and  
8 let me show you how.

9 To the extent the court is concerned -- and this may  
10 have come up in your questioning of Professor Shavell -- with  
11 the possibility that the 2.805 billion may be too high an  
12 amount for lost rental income because it covers the full lease  
13 term, the answer is that's something for the tort award to  
14 decide, for the jury to decide.

15 THE COURT: I don't understand what you are saying.  
16 Say that again.

17 MR. WILLIAMSON: There was a concern being evidenced  
18 in your Honor's questioning of Professor Shavell, to the extent  
19 that when you were asking him about the 2.805 billion, doesn't  
20 that go out the full lease term --

21 THE COURT: Doesn't what?

22 MR. WILLIAMSON: Doesn't it go out the full lease  
23 term.

24 THE COURT: Not it is a present value, not a full  
25 lease term.

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Summation - Mr. Williamson

1 MR. WILLIAMSON: I know.

2 THE COURT: It's different.

3 MR. WILLIAMSON: I know that. But I thought your  
4 Honor was expressing a concern that that may lead to too great  
5 a recovery for lost rental income.

6 THE COURT: Only if the lost rental income goes out to  
7 the full term and there is a replacement as well, and that's  
8 not what happens in insurance. Business interruption is  
9 limited by time. It's even called time element insurance in  
10 Tower 7. It is limited in time, and it kicks in only until a  
11 reasonable replacement period is established either by  
12 definition of the contract or by operation or custom and  
13 practice.

14 MR. WILLIAMSON: So two points on this, your Honor.  
15 The first is that that is not the subject of the correspondence  
16 trial. It is the subject of the tort damages trial for the  
17 jury to decide if that's an issue.

18 THE COURT: No, it is a correspondence issue. It is  
19 because what we are looking for is how do you restore a person  
20 to where he was as of September 11, 2001? That's what we are  
21 trying to do. That's what tort does. How do you restore? You  
22 pay the value we have lost. In insurance, you are doing it by  
23 the two types of insurance -- business interruption and  
24 replacement. Replacement is limited in amount to what they  
25 call the actual cash value less depreciation -- I never quite

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Summation - Mr. Williamson

1     figured that out, but it really is what the building is worth  
2     at the time it was destroyed, given the fact that it is a  
3     25-year-old building.

4             MR. WILLIAMSON: Your Honor also commented that that  
5     would be factored in in mitigation. But mitigation would be a  
6     separate recoverable form of damages if that money is taken  
7     from replacement cost insurance recoveries in order to rebuild  
8     the buildings, so that your Honor would say that will reduce  
9     your lost rental income, then that's monies that are being used  
10    for mitigation expenses, again, something that would be part of  
11    the tort trial.

12            Let me go to something that I asked Professor Fischel,  
13    one of my last questions, which sheds a lot of light on the  
14    discussion this morning and at the trial.

15            I asked him:

16    "Q Isn't it true, sir, that a correspondence analysis doesn't  
17    look at what you do with the money but rather what the money  
18    was paid for from collateral sources?" And he confirmed that  
19    was his understanding.

20            So the discussion that we are having about what did  
21    you do with the money, did you rebuild, did you use it to  
22    restore your income stream is not part of the correspondence  
23    analysis under the statute and the case law. In fact, it is  
24    supposed to be used to determine is there a duplication between  
25    your categories of losses recoverable in tort and the

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Summation - Mr. Williamson

1 categories of insurance recoveries that you receive. What did  
2 you receive the money for, not what you did with it.

3 Flaw number 7, please. Thank you.

4 The defendants' theory would result in a windfall for  
5 defendants, we submit. Your Honor has said that's not helpful  
6 to this discussion, so I will move on to flaw number 8. Just  
7 one more after this, your Honor.

8 Flaw number 8 is the defendants want to ignore that  
9 the plaintiffs bought insurance specifically to protect their  
10 contractual obligation to rebuild. There has been discussion  
11 of that this morning.

12 We know that plaintiff suffered replacement cost  
13 losses because they had the leases requiring them to rebuild.  
14 Mr. McKinley established that the leases -- and the lease  
15 themselves of course provide this -- that the leases required  
16 that insurance be purchased on a replacement cost basis.

17 And then you have the discussion this morning and  
18 during the trial of why they feel that it is very important  
19 that the insurance policies didn't require rebuilding. They  
20 were looking for that linkage. Professor Fischel was looking  
21 for it. The defendants have been talking about it. As  
22 Mr. McKinley explained, they are look in the wrong place.  
23 That's not the way it works. If you want to know if there is a  
24 lease obligation to rebuild, you look at the lease. He  
25 explained that, as an insurance broker, decades of experience,

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Summation - Mr. Williamson

1 you look at the lease provisions to see if there is an  
2 obligation to rebuild. If there is, you will recall, he said  
3 you check the box, make sure you get that coverage for your  
4 insured, because it's a separate category of insurance. That's  
5 how it works. That's where you look, not where they were  
6 looking. That's why they couldn't find it.

7 So in this case, plaintiffs bought the insurance to  
8 protect themselves on their rebuilding obligations; and, as  
9 your Honor noted, the Port Authority would have wanted that  
10 comfort. But this court has held there are no tort damages  
11 recoverable for that loss in tort, that is, for the obligation  
12 to rebuild. So now the aviation defendants argue we shouldn't  
13 even be able to keep all of the insurance recoveries and use  
14 them for rebuilding. They should be used, as they said  
15 earlier, to offset some of our tort damages.

16 The last one before I conclude, your Honor, flaw  
17 number 9, we heard this discussed again this morning, for  
18 defendants advance again the proposition that this case is just  
19 like *Fisher*, and your Honor noted that it is not. In fact,  
20 your Honor has previously held that "unlike the plaintiffs in  
21 *Fisher*" -- here you were dealing with 7 World Trade Center --  
22 7WTC's insurance recovery was not only compensation for lost  
23 property value, but also compensation for 7WTC's contractual  
24 obligation to rebuild Tower 7 following its destruction." It  
25 went on to say, "Because aviation defendants are not liable in

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Summation - Mr. Williamson

1 tort for 7WTCO.'s contractual obligation to rebuild, 7WTCO.'s  
2 insurance recovery does not perfectly correspond to aviation  
3 defendants' potential tort liability."

4 THE COURT: I can tell you, Mr. Williamson, I was  
5 struggling the concepts throughout these decisions, and one of  
6 the reasons I asked for this hearing and declined to give  
7 summary judgment was because of that difficulty. But the  
8 benefit of listening to the experts, all four of them, helped  
9 me understand the concepts.

10 MR. WILLIAMSON: Understood, your Honor.

11 The point was made during Mr. Podesta's closing  
12 argument, in discussing *Fisher*, that *Fisher* set forth some of  
13 the analysis and that I used that to discuss some of the  
14 analysis for correspondence; and he is right, but that was only  
15 the beginning. He left out the fact that *Oden*, importantly,  
16 requires direct and close correspondence. Also, in *Fisher*, the  
17 court found there was one loss, the loss of the home, not two  
18 losses, which is what your Honor found. So big distinctions.

19 And we know, your Honor, that previously you have held  
20 that the replacement cost losses that plaintiffs suffered -- go  
21 to your slide, please -- are not recoverable in tort. Your  
22 Honor conducted that analysis; dismissed the claims for  
23 replacement cost losses; cited *Derdiarian*; noted in that case  
24 the Court of Appeals found that proximate cause analysis stems  
25 from the policy considerations that serve to place manageable

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Summation - Mr. Williamson

1 limits upon the liability that flows from negligent conduct.

2 THE COURT: "I know the aviation defendants are not  
3 liable for the specific performance obligations of tenants and  
4 owners, for such liability would be uncontrolled and  
5 potentially ruinous," citing *Derdiarian*.

6 MR. WILLIAMSON: Yes, your Honor.

7 THE COURT: The probable consequences of the tort is  
8 the destruction of the building. The contract clauses give  
9 rise to contract damages. But if the breaches of contract or  
10 the failures of contract or the obligations of contract are not  
11 the natural and probable consequences of the tort, the  
12 tortfeasor is not responsible for what an injured party loses  
13 by way of contract, at least not yet. Tort deals with  
14 replacement of what was. The contract deals with destruction  
15 of reasonable expectations of profits. They are different.

16 MR. WILLIAMSON: We have here, your Honor, the ironic  
17 situation that the defendants, having gotten their way and  
18 succeeded in having the tort claims for replacement cost losses  
19 dismissed, now turn around and say, oh, well, you could have  
20 recovered in replacement cost losses if you look at it from the  
21 standpoint of the measurement, and they keep saying let's  
22 measure it that way, as if that somehow magically is going to  
23 reinstate our tort claims for replacement costs.

24 THE COURT: This argument "windfall" gets us nowhere.  
25 The defendant airlines, under the Air Transport Safety and



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Summation - Mr. Williamson

1 System Stabilization Act, are limited in liability to their  
2 insurance coverage. The insurers paid out over \$4 billion.  
3 Your client lost a lot of money, but is limited in recovery to  
4 \$2.805 billion.

5 In my opinion, no one is enjoying a windfall.  
6 Everyone is suffering from 9/11. The concept of a windfall is  
7 foreign to me. This is a case about a disaster, and we are  
8 hearing about a dispute between two people, who suffered  
9 different aspects of the disaster, trying to sort out what one  
10 may owe to the other, if anything. To talk about a windfall in  
11 this concept is obnoxious in a sense. Nobody enjoyed a  
12 windfall from 9/11.

13 MR. WILLIAMSON: I bring it up, your Honor, for only  
14 two reasons. One is, the Court of Appeals has said that the  
15 CPLR 4545 analysis has to be conducted to make sure there is no  
16 windfall for the plaintiffs, but no windfall for the  
17 defendants.

18 THE COURT: Yes, but nobody is enjoying a windfall out  
19 of this.

20 MR. WILLIAMSON: I bring it up for the second reason  
21 that the claim has been made by the aviation defendants for  
22 years now that if you were to allow anything less than total  
23 correspondence, it would be a windfall to the plaintiffs. So I  
24 was trying to address that, your Honor.

25 With respect to the methodology that's used to apply

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Summation - Mr. Williamson

1 of CPLR 4545, I would just like to touch on that briefly.

2 THE COURT: You know what? I don't see windfall here.  
3 I see heroism. So it is easy to vilify developers, but the  
4 fact is that Larry Silverstein, having faith in the economy of  
5 Manhattan and New York, built Tower 7 on speculation that he  
6 would have tenants. I don't know how much equity money he had  
7 in there, but he had his life in there. He took a risk and he  
8 put up Tower 7, and it is now wonderful that there are tenants  
9 inside.

10 The Freedom Tower is all but complete. When I look at  
11 Manhattan -- and I drive down every day -- when I look at  
12 Manhattan, I enjoy that Freedom Tower. The absence of the Twin  
13 Towers was like the loss of front teeth. It was a mar and it  
14 was a disgrace to the United States. The erection of its  
15 replacement in great splendor, gorgeous building, 1776 feet  
16 high, is a wonderful achievement.

17 So I don't look upon this case as windfalls. I look  
18 upon this as an American story of rising out of the ashes of  
19 destruction to face the world with our unbounded optimism.  
20 That's how I look upon this. Windfalls have nothing to do with  
21 my analysis and how I deal with this case.

22 MR. WILLIAMSON: I personally share your Honor's  
23 sentiment. Our offices, as you know, were right across from  
24 Ground Zero.

25 THE COURT: I know you were.

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Summation - Mr. Williamson

1 MR. WILLIAMSON: We were there on 9/11 and had to  
2 leave. We were out of our offices for months. So the blight  
3 on New York, the missing two front teeth is a good metaphor. I  
4 absolutely agree.

5 Just to conclude, with regard to adding all these  
6 fundamental flaws together, we see that they are fatal flaws  
7 and they defeat, in our view, defendants' correspondence claims  
8 when the statute is applied.

9 We know the standard of proof, your Honor. The burden  
10 of proof is on the defendants. Reasonable certainty is  
11 required by the statute. Your Honor knows that courts have  
12 construed that as clear and convincing evidence or evidence  
13 showing a high probability of correspondence. The  
14 correspondence has to show under the teaching of *Oden* and  
15 *Turnbull* that --

16 THE COURT: And *Fisher*.

17 MR. WILLIAMSON: I'm sorry?

18 THE COURT: And *Fisher*.

19 MR. WILLIAMSON: No, but actually this one, I think,  
20 *Turnbull* and *Oden*, coming after *Fisher*, have elucidated how to  
21 conduct the correspondence. They said -- their words, not  
22 mine -- "you have to duplicate the loss." The collateral  
23 source recovery has to match up, has to be in lieu of, their  
24 words, "the touchstones of the analysis."

25 THE COURT: I think I expressed my view on that when I

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Summation - Mr. Williamson

1 asked the questions of Professor Shavell and when I inquired of  
2 both Mr. Podesta and you.

3 I'm sorry. Go ahead. Finish up.

4 MR. WILLIAMSON: Thank you.

5 Are those words used in the analysis? No. They are  
6 not. Did Professor Fischel use them? No, he did not. And in  
7 what was just submitted to you today, if you look at the title  
8 on page 2, it doesn't say "duplicate" or "replace." It says  
9 "were the funds used to assist." "Used to assist" is not the  
10 test. What did you with the money is not the test. "Assist"  
11 is not the test. They are just not following the statute, just  
12 not following the governing case law.

13 If you turn to page 3, they say, Did the use of the  
14 monies enable the plaintiffs to do something? That's not the  
15 test.

16 We submit that Professor Shavell's methodology of  
17 analyzing it was consistent with the statute. Defendants  
18 offered no analysis, no contrary recommendation. They just  
19 used words like "well, it's not related to, it's not connected  
20 with, it's not connected to." But that's not the test. And we  
21 never saw the statute come up during my colleague's closing  
22 argument.

23 We submit that, based on the evidence presented to  
24 your Honor in this trial, defendants' correspondence should be  
25 zero. If your Honor disagrees and finds there should be some

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Summation - Mr. Williamson

1 correspondence, at least our expert has offered an analysis of  
2 that in precise dollar figures. And, as your Honor knows, from  
3 their pretrial brief, they have adopted that. To be sure, they  
4 want zero correspondence. They want to pay nothing. That's to  
5 be sure. But they have concede that, even though their expert  
6 offered no possible allocation, that the most practicable  
7 allocation is the one offered by Professor Shavell. They  
8 accept it. They credit him for that. They take all of his  
9 numbers, credit them, and come out with his final conclusion  
10 which, if adopted by your Honor, as he explained, would have an  
11 offset of \$638 million for the main site and an offset of \$244  
12 million for 7 World Trade Center site.

13 Thank you very much, your Honor.

14 THE COURT: Mr. Podesta.

15 MR. PODESTA: Your Honor, as a big firm commercial  
16 lawyer, I have strong instinct to refute in detail everything  
17 Mr. Williamson just said, including presenting a graphic  
18 depicting an erudite analysis of the henhouse analogy.  
19 However, I have decided to --

20 THE COURT: How many roosters?

21 MR. PODESTA: Well, you know, roosters, this is a  
22 henhouse analogy. That is beyond the scope. Roosters are  
23 beyond the scope, your Honor. I don't know if these hens have  
24 been inseminated at all.

25 But I decided to be practical. I accede to your

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Rebuttal - Mr. Podesta

1 Honor's exhortations. The point I would make in rebuttal is  
2 this: *Fisher* was decided in 2002, seven years after *Oden*.  
3 *Oden* cannot in any way be considered to supplant *Fisher*, which  
4 contains an extended discussion of *Oden*.

5 With that, I waive further rebuttal.

6 THE COURT: I want to ask you a question, and maybe I  
7 will ask the question of Mr. Williamson also.

8 So replacement insurance reimburses for the cost of  
9 replacement at the time of replacement up to the values that  
10 were established at the time of loss. So there's an inflation  
11 factor that is covered by insurance in replacement insurance.

12 MR. PODESTA: There can be, depending how old the  
13 property is, if you compare it to actual cash value.

14 THE COURT: It wouldn't depend on that. Let's say you  
15 lose \$100,000 building, but the cost of rebuilding the building  
16 as it was at the time is \$125,000.

17 MR. PODESTA: Yes, your Honor is correct. And, of  
18 course, the diminution in fair market value is similarly  
19 measured as of the date of the loss.

20 THE COURT: So I am positing that there is a \$100,000  
21 value of the old building as it existed at the time of the loss  
22 and it costs \$125,000 to rebuild that old building.

23 MR. PODESTA: And would you get that. You would get  
24 the replacement cost insurance.

25 THE COURT: Does that affect me on the correspondence

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1 theory?

2 MR. PODESTA: No, it doesn't. That's really the same  
3 situation that was in place in *Fisher*, where they also had  
4 replacement cost insurance present.

5 THE COURT: You just can't get more than the value.

6 MR. PODESTA: Yes, that's correct.

7 THE COURT: Mr. Williamson, do you have an opinion?

8 MR. WILLIAMSON: Yes, two comments.

9 The first is that replacement cost losses under  
10 insurance of course only up to the amount of insurance  
11 coverage. If your actual replacement cost losses are greater,  
12 you are not going to recover them. You are just not going to  
13 recover them because you are underinsured.

14 The second point is, to the extent we are going back  
15 to *Fisher* each time, your Honor might want to consider looking  
16 at the lower court's decision because in that case, with loss  
17 being the single loss of a one-family home, the lower court --  
18 and the jury verdict shows this -- actually allowed the jury to  
19 consider several other categories of losses, several pages,  
20 actually, on the jury verdict form of other categories of  
21 losses. So it wasn't just this one-dimensional analysis of the  
22 diminution in fair market value versus replacement cost. There  
23 were numerous other categories of tort damages that were  
24 allowed in that case.

25 THE COURT: Thank you, Mr. Williamson.

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1           We will reassemble at 2:30. Before we do, before I  
2 forget, I want to commend both sides for the way that they have  
3 presented their case. It has been a fascinating exercise for  
4 me, and it is only that way because of the brilliance and  
5 cooperation of counsel. So I have a great debt to pay to  
6 counsel on both sides for this.

7           MR. PODESTA: Thank you, your Honor.

8           MR. WILLIAMSON: Thank you, your Honor.

9           THE COURT: 2:30.

10          (Luncheon recess)



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## AFTERNOON SESSION

2:30 PM

(In open court)

THE COURT: The issue that I have to decide is whether the recoveries by the plaintiffs, according to the insurance and the categories of insurance on which they were paid, correspond; and if they do, do they exceed to a reasonable certainty the categories of potential tort recoveries? My holding is that they do, and what follows will be my findings and conclusions to support that view. My plan is to replace these oral expressions with a written set of findings and conclusions, hopefully within a two-week span, that will restate in perhaps more literate fashion what I am expressing orally.

I've written extensively on different aspects of this case and the related cases, and I'd like to believe that the facts and rulings of law that I've expressed in those prior decisions are familiar and will not be repeated except to the extent that I need to do so. I'll recite a few that are perhaps most pertinent. They're all called In Re: September 11th Litigation, so I'll just give you the record citations: 590 F.Supp.2d 535, December 11, 2008, in which I held that WTCP could recover only the fair market value of its leasehold interests and not damages related to its contractual obligations; 2009 WL 1181057, April 30, 2009, in which I found

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1 that the fair market value of the leashold was \$2,805,000,000;  
2 908 F.Supp.2d 442, December 5, 2012, in which I found that for  
3 Tower 7 damages were limited to the value of the leasehold --  
4 that value was presumptively \$737 million, a number taken from  
5 the report of WTCP's expert -- and, as with the others, that  
6 factual findings would have to be made after a trial.

7 I always forget where the various buildings were  
8 located, and there's a map in several of these decisions, but  
9 I'm looking at one at 865 F.Supp.2d 370, September 23, 2011.  
10 The title of that case is AEGIS Insurance Services, Inc.  
11 against 7 World Trade Company L.P. and many other parties.

12 While I have that map, let me describe it into the  
13 record. The Twin Towers were numbers 1 and 2. Number 2 was on  
14 the southerly side, fairly close to the westerly corner, along  
15 West Street. Number 1 was the northerly tower, and it fronted  
16 on West Street. There was a large plaza in the center. On the  
17 southerly side, and filling out most of the southeast corner,  
18 was number 4 WTC. North of number 1 was a relatively low  
19 building, number 6 WTC, and that filled most of the northwest  
20 corner.

21 As I look at the map, to the right but on the  
22 northeast corner was number 5 WTC, also a relatively lower  
23 building. Vesey Street bound the main property to the north.  
24 On the north of Vesey Street was located 7 WTC, 7 World Trade  
25 Center, or Tower 7. I don't know what happened, I know that

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1 number 6 was also destroyed, but it wasn't mentioned in this  
2 litigation.

3 Mr. Williamson, why is that? Does anyone know?

4 MR. WILLIAMSON: Yes, your Honor. Because the  
5 plaintiffs had no lease for that.

6 THE COURT: That remained in the Port Authority; is  
7 that right?

8 MR. WILLIAMSON: I think that's correct.

9 THE COURT: So we're involved in two cases here,  
10 Towers 1, 2, 4 and 5, and Tower 7.

11 On July 16th, 2001, the real estate developer Larry  
12 Silverstein, through affiliated companies -- withdrawn. Let me  
13 start again. I'm sorry.

14 In the early 1960s, the Port of New York was suffering  
15 economically, and the States of New York and New Jersey sought  
16 to revitalize the downtown area. A compact had earlier been  
17 made; and as part of that compact, and under direction of the  
18 governors of the two states, the World Trade Center was to be  
19 built in Lower Manhattan, with the goal of making the area a  
20 center for international trade and finance.

21 Under the aegis of the Port Authority of New York &  
22 New Jersey, construction began in 1965. The Twin Towers opened  
23 for tenancy, for occupancy by tenancy, in 1973. Other towers  
24 followed -- 4, 5, 6 and 7.

25 On December 31, 1980, the Port Authority entered into

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1 a ground lease with 7 World Trade Company L.P., a company  
2 associated with Silverstein Properties, for the development and  
3 construction of Tower 7.

4 Upon its completion, in 1987, the lease between the  
5 Port Authority and the Silverstein company involved -- 7 World  
6 Trade Center Company became effective.

7 What is important here is that Silverstein, through  
8 affiliated companies, on July 16th, 2001, executed net leases,  
9 and the Port Authority of New York & New Jersey conveyed four  
10 99-year net leases to Towers 1, 2, 4 and 5. Silverstein paid,  
11 and the Port Authority accepted, the equivalent of  
12 \$2,805,000,000 -- partly in cash, partly in the form of  
13 continuing payments -- and that became the \$2,805,000,000, the  
14 purchase and sale price for the net leasehold.

15 That price was established following a worldwide  
16 auction. Each of the four leaseholds was by then a developed,  
17 multifloor office building, of various heights. The buildings  
18 then were up to 25 years old. The buildings were owned by  
19 affiliated WTCP companies.

20 The lease agreements provided that the owner of the  
21 leasehold had to obtain and carry at least \$1.5 billion of  
22 actual replacement cost insurance and had the obligation to  
23 rebuild, restore, repair and replace the buildings, if  
24 destroyed, to the extent feasible, prudent and commercially  
25 reasonable, in accordance with the original plans and

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1 specifications or to the extent modified by mutual consent.

2 I found that, as of September 11, 2001, less than two  
3 months later, that the market value was the same amount,  
4 \$2,805,000,000. The cost of replacing the towers, as they  
5 stood at the time and subject to the market value they had, was  
6 higher.

7 As to Tower 7, the Silverstein owning company enjoyed  
8 a market value, as of September 11, 2001, of \$959 million. And  
9 that number was taken from the plaintiffs' expert.

10 I think I have the wrong number there. I think it's a  
11 lower number. It's \$737 million exclusive of any recovery  
12 associated with fine arts losses, namely, two paintings by  
13 Frank Stella, stipulated to be worth not more than \$1 billion.

14 Towers 1, 2, 4 and 5 were insured by 24 insurers,  
15 arranged according to a tower of insurance, arranged so that  
16 one insurer would pay up to the limits before the next insurer  
17 in the tower would begin to pay, and so on. The total of  
18 insurance was \$3,546,800,000 per occurrence. The policies  
19 provided coverage for business interruption, lost rentals, and  
20 the cost of replacing the buildings if they were damaged or  
21 destroyed. Most of these policies were in the form of slips or  
22 very brief binders binding the insurers. At the time of the  
23 loss, not many of them had been spread over the many insuring  
24 agreements and clauses of exclusion and exception that form an  
25 insurance policy, a commercial insurance policy, of a large

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1 building.

2 As to Tower 7, Industrial Risk Insurers, or IRI, was  
3 the only insurer. That policy covered property damage, rental  
4 insurance, called time element, and extra expenses. There was  
5 a blanket limit for the property damage and time element of  
6 \$860 million per occurrence, and there was a sublimit of  
7 \$1 million for extra expense.

8 On the morning of September 11, 2001, two terrorists  
9 cleared security at Portland International Airport in Maine and  
10 caught an early morning flight to Boston's Logan Airport. At  
11 Logan, they rendezvoused with three other terrorists, and the  
12 five boarded American Airlines Flight 11, a loaded-with-fuel  
13 Boeing 767 jet intended to travel to Los Angeles. Five other  
14 terrorists also cleared security at Logan Airport and boarded  
15 United Airlines Flight 175, also a fuel-laden 767, also headed  
16 for Los Angeles.

17 The airplanes took off from Logan at 7:59 a.m. and  
18 8:14 a.m. respectively on the morning of September 11. The  
19 terrorists quickly highjacked the two planes, turned them  
20 towards New York City at low level, and crashed them  
21 purposefully and willfully into both towers. Flight 11 crashed  
22 into Tower 1, the northerly tower, at 8:46 a.m. United Flight  
23 175 crashed into Tower 2 at 9:03 a.m. The crashes turned both  
24 towers into infernos. The raging fires caused the buildings to  
25 collapse -- the northerly tower at 9:59 a.m., the southerly

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1 tower at 10:28 a.m. The falling debris caused fires to erupt  
2 on the remaining towers in the main center and jumped across  
3 Vesey Street into Tower 7 as well. After burning for several  
4 hours, each of these buildings was substantially destroyed.  
5 The description of the destruction can be found in more detail  
6 in 865 F.Supp.2d 370.

7           Shortly after the attacks, WTCP began filing claims  
8 with its insurers, seeking to recover the losses it suffered as  
9 a result of the attacks. WTCP brought a lawsuit against these  
10 insurers and claimed in that lawsuit that the insurers had  
11 acted in bad faith in not fully compensating them. WTCP  
12 claimed a total loss for Towers 1, 2, 4 and 5 of  
13 \$8,053,000,000, divided into claims for replacement cost of  
14 \$7,183,000,000, constituting 84.2 percent of its claim, and  
15 \$1,347,000,000 in business interruption loss, based on the  
16 stoppage of payments by all its sublessees.

17           Several of the insurers challenged the estimates,  
18 claiming that the losses were inflated. An appraisal panel --  
19 consisting of one representative picked by each side and a  
20 neutral umpire picked by the two representatives -- conducted  
21 99 days of hearings to appraise WTCP's claimed loss.  
22 Ultimately, the appraisal panel determined that the cost of  
23 replacing the core and shell of the four buildings, not  
24 including tenant improvements, defined as nonessential walls  
25 and floor coverings, as \$4,159,000,000. The lost rental income

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1 was not subject to estimate. There was no appraisal done with  
2 respect to Tower 7.

3 As this process went on, most of the insurers advanced  
4 into interim payments without prejudice to either the insurers  
5 or the insured. So, all claims were reserved.

6 By July 2007, all the insurers had settled. In total,  
7 the insurers paid \$4,582,000,000 to WTCP and its coinsured,  
8 Westfield. Westfield was the owner of long-term leases to the  
9 shopping arcade in the main floor and the basement of the two  
10 Twin Towers.

11 Most of the insurers paid the exact amounts of their  
12 policy limits -- some slightly more by an order of magnitude of  
13 about 2 percent, some less than their policy limits -- I'm  
14 sorry, let me start again. Some paid the policy limits, some  
15 paid a bit more than the policy limits, up to an order of  
16 magnitude of 2 percent. Deducting the insurance payments that  
17 went to Westfield, WTCP received from insurance \$4,091,000,000.

18 This amount, of \$4,091,000,000, was less than WTCP's  
19 claim. Although the insurers did not ever reach final  
20 agreement on the amount of the insurable losses claimed by WTCP  
21 or any allocation as between the losses claimed, the policy  
22 limits, as agreed and settled, of 4,091,000,000, capped the  
23 payments. The insurers called this a policy limits loss.

24 A complete settlement agreement and releases followed,  
25 again, without allocation. And there was no allocation as



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1 between the two categories of claim, for business interruption  
2 and for replacement cost.

3 Some smaller amounts are also relevant. Claims  
4 preparation fees of \$10,352,540 is a proper deduction from the  
5 amount of insurance received, as well as the costs and fees of  
6 the appraisal proceeding aggregating \$31,030,471. Another  
7 deduction are two years of premiums, of \$5,898,714. The three  
8 categories add to \$47,281,725, and, after deduction, the net  
9 insurance recovery becomes \$4,044,000,000.

10 As to Tower 7, 7 WT Co. claimed a total loss of  
11 \$1,497,000,000, of which \$1,053,000,000, constituting  
12 70.4 percent of the total claim, was for the cost of  
13 replacement, and \$442 million for lost rental income, less  
14 retenanting costs, constituting 29.5 percent of the claim. In  
15 addition, less than 1 percent related to personal property of  
16 \$1,800,000.

17 Again, a lawsuit was brought, on June 12, 2003,  
18 claiming that IRI had not sufficiently compensated 7 WT Co. for  
19 its losses.

20 About a year and a half later, on January 3, 2005, the  
21 parties settled. IRI agreed to pay 7 WT Co. \$819 million plus  
22 a small portion of a subrogation claim that IRI pursued against  
23 the insurers, or the aviation defendants. That was liquidated  
24 into an additional \$12 million paid to 7 WT Company, and the  
25 two payments of \$819 million and \$12 million adds to a payment

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1 of \$831 million, paid to WTCP and accepted by it in full  
2 settlement of its claims. So, again, the total of claims  
3 exceeded the amount paid.

4 Again, the settlement did not make any allocation as  
5 among the three categories of loss, and all claims and all  
6 potential claims were settled in the broad form of release that  
7 was exchanged.

8 I mentioned previously two Frank Stella paintings.  
9 There was a separate insurance policy covering fine arts issued  
10 by AXA Nordstern Art Insurance Corporation. A separate claim  
11 was filed for the two paintings, both located in Tower 7. AXA  
12 paid \$700,000 on the claim. Since the parties stipulate that a  
13 jury could award up to \$1 million for the loss of the two  
14 paintings, a \$300,000 balance remains to be litigated, but I  
15 think the parties are willing to stipulate that if a judgment  
16 is entered for the finding I have expressed at the outset,  
17 namely, that there is no correspondence, that amount will be  
18 paid without the need for further litigation by 7 WT Co.  
19 against AXA. And that would finally resolve all the claims in  
20 these two lawsuits.

21 Again, there were offsets of \$1,587,410 in claims  
22 preparation fees and \$482,793 in insurance premiums, reducing  
23 the net insurance recovery to \$829 million. That recovery in  
24 insurance exceeds the limit. I ruled it was the fair market  
25 value of Tower 7 immediately prior to the destruction of the

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1 building on September 11, 2001. That fair market value was  
2 \$737 million exclusive of the fine arts losses. And I took  
3 that number from plaintiffs' expert Terry Vandell.

4 The amounts I've stated are not the precise amounts,  
5 they're rounded. When we issue our written findings and  
6 conclusions, the exact amounts will be used.

7 New York's Civil Practice Law and Rules Section 4545  
8 provide that if a plaintiff has been compensated for economic  
9 loss by a collateral source, such as insurance, the plaintiff  
10 cannot recover compensation again in a tort lawsuit against a  
11 defendant. The written findings and conclusions will state the  
12 precise terms of the statute as it was in effect at the time of  
13 the loss.

14 It's important to note that Section 4545(c) does not  
15 provide for a reduction in damages based on whatever  
16 recoveries, whatever collateral recoveries, there exist. A  
17 reduction is authorized only when the collateral source payment  
18 represents reimbursement for a particular category of loss that  
19 corresponds to a category of loss for which damages were  
20 awarded. I quote from Oden against Chemung County Industry  
21 Development Agency, 87 N.Y.2d 81, 84, a decision of the  
22 New York Court of Appeals in 1995.

23 As I announced at the outset, the burden of proving  
24 this affirmative defense is on the defendants. The defendants  
25 must prove correspondence to a reasonable certainty in order to

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1 obtain an offset against potential tort recoveries. That's a  
2 decision of the Second Circuit in *Turnbull versus U.S.*  
3 *Air, Inc.*, 133 F.3d 184, 187 (2d Cir. 1998).

4 Fisher against Qualico Contracting Corporation, 98  
5 N.Y.2d 534, 537, decided by the New York Court of Appeals in  
6 2002, stated the purpose of Section 4545 to eliminate windfalls  
7 and double recoveries for the same loss. The Court cautioned  
8 the Court should not subtract nonduplicative payments because  
9 doing so would produce results beyond those numbers to remedy  
10 the windfalls to plaintiffs at which the legislation was aimed  
11 and would confer an undeserved windfall on tort defendants and  
12 their insurers. The Court cited Oden's prior decision, 87  
13 N.Y.2d, 88.

14 I remarked this morning that I find the phrase  
15 "windfall" as an epithet and not very useful in analysis and  
16 particularly obnoxious in the case that we have. I won't  
17 repeat my remarks, but it's sad to remember our feelings on  
18 September 11, 2001, not only as New Yorkers but reflecting the  
19 sentiment all across the United States and indeed throughout  
20 the world. We were dealt a very severe blow. The people who  
21 came to the rescue of New York -- the first responders who  
22 worked for the various construction companies, the firemen,  
23 policemen, the volunteers, the construction companies, and the  
24 actors involved here, including Larry Silverstein -- all were  
25 heroes because they worked hard to create beauty out of the

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1 ashes of destruction and expressed pride in going into Tower 7,  
2 the first building that was rebuilt by Mr. Silverstein, on  
3 speculation but now with tenants; and in seeing the Freedom  
4 Tower -- I don't think it's called the Freedom Tower anymore  
5 but I'll call it that -- 1776 feet high in beautiful splendor  
6 over Lower Manhattan. It's not easy to do these. It takes  
7 great risk, it takes great imagination, it takes great skill.  
8 So, to talk about windfalls in this context is something that I  
9 will not do.

10 So, how do I apply these rules? First, as I did in  
11 examination of Professor Fischel and in examination of  
12 Professor Shavell, it's important very much to understand what  
13 economically was the loss on September 11. The purchases of  
14 the leaseholds that constitute World Trade Center Properties  
15 purchased an income-producing asset. They valued the income  
16 stream over a very long term, produced by that asset, in coming  
17 to the purchase and sales price, the two prices because there  
18 was different times one for four towers of the main property  
19 and then for Tower 7.

20 That income-producing asset was destroyed, and two  
21 categories of insurance were there to compensate the owners.  
22 The owner was intent on restoring the property. The cost of  
23 replacing the asset that was destroyed, according to how it  
24 stood on the morning of September 11, 2001 and according to its  
25 then market value, compensated the owners for that loss but not

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1 completely, because they needed to be compensated as well for  
2 the period of time when they were not being paid by tenants  
3 because there was no building in which they could occupy the  
4 premises for their businesses.

5 That loss was compensated by business interruption  
6 insurance. We call that loosely, in the discussions with the  
7 expert, lost income, but it was less in the lost income of the  
8 owners of the leaseholds. The leaseholds had been purchased for  
9 a long-term stream of income. The business interruption  
10 compensated them for a short term of that loss, and the cost of  
11 restoring the property thereafter enabled them to continue to  
12 enjoy their income stream. In that context, there was complete  
13 correspondence. The amount of insurance exceeded the fair  
14 market values that went into the insurance recovery, reflecting  
15 that the cost in an inflation market to purchase and install  
16 the materials that were to replace the destroyed asset,  
17 according to its situation and value as of 9/11/01, may have  
18 cost more but the replacement, by compensating lost income and  
19 by compensating the cost of replacement, were the same.

20 In Professor Fischel's view, it was one loss; it was  
21 the replacement of the asset-producing income. The purchaser  
22 pays according to the income stream. The insurance assures the  
23 continuation of that income stream, both by business  
24 interruption insurance and by replacement cost. And that's  
25 what he said.

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1           And the same with Professor Shavell. Fischel  
2 testified: "If you're trying to calculate market value or lost  
3 market value, what you're really calculating is a present value  
4 of a lost rental stream." That's at page 186 of the  
5 transcript. "Replacement cost involves not only the physical  
6 cost of rebuilding" -- and that's replacement value -- "but  
7 also compensation for the interim period between the time of  
8 loss and the time of rebuilding, but once rebuilding occurs,"  
9 he continued, "there is no more business interruption.  
10 Business has resumed in a sense and, therefore, if you add the  
11 two together, that fully compensates a plaintiff." That's at  
12 206 of the transcript.

13           Michael Beach, defendants' insurance expert, testified  
14 that the "Property damage coverage responded to the physical  
15 loss or damage to the building, which would enable them to  
16 retenant, return their revenue streams." And that's at page  
17 116.

18           Professor Shavell testified consistently: "The  
19 connection is that you can't begin to enjoy an income stream  
20 unless you fork out the money for replacement." And that's  
21 exactly what the New York Court of Appeals said in Fisher. In  
22 that case, the Court held that homeowners whose home was  
23 destroyed in a fire should deduct their replacement cost  
24 insurance recovery from their damages. The Court ruled that  
25 replacement cost and diminution in market value are simply two

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1 sides of the same coin, each is a proper way to measure lost  
2 property value, the lower of the two figures affording full  
3 compensation to the owner. In this case, the collateral source  
4 payment was the Fishers' replacement cost insurance proceeds,  
5 and it corresponded, the Court found, to their property loss,  
6 properly offset against the damages award. That's at page 540  
7 of the decision.

8           The illustration that I thought captured this -- and  
9 Professor Fischel agreed -- is that the law does not give you  
10 an incentive to put up a mansion in place of a slum. The  
11 building that you have, if a slum, had a certain value. If  
12 it's destroyed, and you get insurance to build a mansion,  
13 that's very nice, but it can't give you more money than you're  
14 entitled to have as of the time of destruction.

15           The fact that plaintiffs were obligated to rebuild by  
16 contract, rather than choosing to rebuild, does not change my  
17 conclusion. An owner of property, if suing in tort and  
18 prevailing, is entitled to the value he lost. In this case,  
19 let's say he paid a million dollars for some asset that  
20 produces income. That was destroyed, that asset was destroyed.  
21 He gets the million back by tort recovery, and he can do  
22 anything he wants with it -- he can squander it, he can put it  
23 in the bank, he can buy other assets, he can go on a cruise, he  
24 can do anything -- but what he's done is to replace by money  
25 the value he lost.



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1           In an insurance context, where the owner of the  
2 property, the Port Authority, wants to make sure that the  
3 lessee for the long term doesn't walk away and doesn't destroy  
4 the value that existed, commonly there is an obligation to  
5 rebuild. But it doesn't change the understanding. Instead of  
6 money that can be the replacement cost to be used in any way it  
7 wants, a contract obligation replaces it. The insurance is the  
8 same. The insurer in this context doesn't care; it has the  
9 same obligation. The covenant to rebuild is for the interest  
10 of the residual owner, but instead of labeling it just money to  
11 pay back the million dollars, the owner is given a lost income  
12 policy, or business interruption, for the time it takes to  
13 rebuild by replacement, and when he restores his income stream,  
14 he gets the income stream again.

15           Both concepts go to one loss, the loss of the  
16 income-producing asset. The measurement can be categorized by  
17 income or by replacement of the asset, but essentially it's one  
18 loss, as Professor Fischel said and as Professor Shavell  
19 recognized from an income perspective. The distinction he  
20 made, by which he made correspondence between the business  
21 interruption and the component of lost income, was made  
22 according to a legal definition. He said that you couldn't  
23 obtain in a tort recovery the replacement cost. But you can,  
24 as Fisher said, as long as it doesn't exceed fair market value,  
25 because, as Fisher said, they're two sides of the same coin.

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1           And that is what we have here, if you want to use the  
2 metaphor of coin, each side capturing different aspects of  
3 value. And when we talk about correspondence, even though we  
4 are corresponding according to categories of loss, economically  
5 we analyze it into the very same concept, of a loss of an  
6 income stream to be replaced partly by business interruption  
7 and partly by replacement cost.

8           Now, there are numbers of other details that I need to  
9 cover. The plaintiff argues, what about the to-be-determined  
10 components of insurance? after all, I suffered many kinds of  
11 losses; if I gave a release, I gave up my right to sue for all  
12 these things, shouldn't that be valued as well?

13           There's some appeal to the analytic argument, but  
14 practically speaking, these points disappear, because they were  
15 not quantified; and if the client didn't quantify it, the Court  
16 shouldn't either -- the parties certainly did not quantify them  
17 even now, when they have an opportunity to do so -- and the  
18 insurance company did not value them in their payments, because  
19 they valued the claims, paid the claims, a lesser amount, and  
20 took a release that could claim everything else. Another part  
21 is that some of these to-be-determined never amounted to any  
22 loss. And another part is that some of them were really  
23 deductions from recoveries and already included in the loss.

24           So, let me give you some details. One category was  
25 tenant improvements, which were given a value of

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1 \$4,159,460,085. To the extent that a tenant improvement adds  
2 to the value of property just before it's destroyed, it can  
3 become an element of claim, and it would increase the values of  
4 each of the properties beyond the amounts I held were the fair  
5 market value. These amounts were not proved when the  
6 plaintiffs had an opportunity to prove, and I had called for  
7 these proofs. And in my decision of April 30, 2009, finding  
8 that fair market value of Towers 1, 2, 4 and 5, there was no  
9 allowance for this number.

10 We know, from experience with leases, that sometimes  
11 tenant improvements can be an asset if they improve the  
12 property, but more often than not they're unique to the  
13 particular tenant that occupies, they're a subject of  
14 bargaining between the landlord and the tenant, who has the  
15 obligation to take it down at the end of the lease and to put  
16 them up at the beginning of the lease. They may be an addition  
17 to value; more frequently than not, they're a reduction from  
18 value, and I can't value them.

19 Furthermore, to the extent that plaintiffs included  
20 them in claiming loss from the insurance company, where they  
21 can be an element of insurance, they've already been included.  
22 In any event, I do not value them for the purpose of this case.

23 Another item was debris removal, pollution cleanup,  
24 and transmission and antenna dishes. Mr. Levy, the chief  
25 financial officer of WTCP, testified by deposition that there

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1 was no expense incurred by WTCP connected with that. So, I do  
2 not make any allowance for that.

3 Another category was retenancing expenses. Well,  
4 retenancing expenses are a proper cost to be netted against  
5 loss of rental income. They do not figure, as I held before,  
6 in a tort recovery. They could figure in netting out how much  
7 insurance one receives, and I assume that they were so netted  
8 out. So, they become an element of a potential insurance  
9 recovery as a deduction from business interruption for lost  
10 income but they do not correspond to anything in a tort  
11 recovery except to the extent that they've reduced the business  
12 interruption recovery that is a matter of correspondence.

13 The end of it is this: If you're looking to recover  
14 the amount of your loss, you're bringing yourself to the point  
15 where you get tenants after replacing the structure. Tower 7,  
16 if I recall correctly, had a one-year extension beyond that  
17 point for what they call time element, or lost income. And the  
18 cost of tenancing, of retenancing, becomes an element in that  
19 aspect, and that's why you get that extra insurance.

20 So, economically, one way or another, it is figured  
21 in; and because it is figured in, it does not become an extra  
22 element of damages but the overall figures are matters of  
23 correspondence.

24 Mortgage-carrying costs, a figure that is said to be  
25 part of extra expenses, and prejudgment interest, which was an

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1 element in a Wilprop form, I held before, are not elements of  
2 any recovery and not matters of correspondence. The owners of  
3 the property, to the extent they have a mortgage on their  
4 property, continue to pay it, according to the terms of their  
5 mortgage. That's the cost of their carrying the property. It  
6 does not figure in their tort recovery and does not figure  
7 unless they get separate insurance for it in their insurance,  
8 and it doesn't play any part in correspondence. And the same  
9 thing with prejudgment interest.

10 The short of it is this: We're talking about major  
11 components of insurance. The insurers paid against claims.  
12 The claims that were submitted were in excess of the insurance  
13 recovered. The insurance recovery, I found and ruled,  
14 correspond against the potential tort recoveries. Hence, if  
15 this case were to go forward, WTCP Companies -- in Towers 1, 2,  
16 4, 5 and 7 -- would not be able to recover anything against the  
17 airlines.

18 And with respect to the artwork, because it's subject  
19 to the stipulation, I suggest that would end that part of the  
20 case as well.

21 Mr. Williamson, apart from your disagreement with my  
22 conclusions, is there anything I missed that I should be  
23 speaking about, that you can think of now?

24 MR. WILLIAMSON: Nothing for us to address at this  
25 time, your Honor.

D7ikwtc

1 THE COURT: Thank you, Mr. Williamson.

2 Mr. Podesta?

3 MR. PODESTA: Nothing to address, your Honor. Thank  
4 you.

5 THE COURT: Then I think we're concluded.

6 I know there are some members of the press that are  
7 here. This is an extemporaneous form -- it's taken some time  
8 and may cover some areas that have been hard to capture -- so,  
9 if the press has any questions -- we don't have to be on the  
10 record for this, Andrew, unless somebody wants it on the  
11 record -- I can entertain any questions and either I or counsel  
12 can answer them.

13 May we go off the record?

14 MR. PODESTA: Yes, your Honor, no objection.

15 MR. WILLIAMSON: Up to you, your Honor.

16 THE COURT: All right, no objection, we can go off.

17 (Discussion off the record)

18 THE COURT: Thank you all very much, and I repeat  
19 again my compliments to the lawyers in this case. Thank you  
20 very much.

21 (Adjourned)